

FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS, JANUARY 1, 1966,
TO JUNE 30, 1966

IN THE MATTER OF POWERNAIL COMPANY ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket C-1028. Complaint, Jan. 7, 1966—Decision, Jan. 7, 1966

Consent order requiring an Illinois manufacturer and distributor of power nailing equipment and nails which are used in the installation of flooring and sheathing to cease using coercive, intimidating, and harassing tactics to force their retail customers to maintain fixed resale prices for respondents' products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (U.S.C., Title 15, Sec. 45), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the parties named in the caption hereof, and more particularly described and referred to hereinafter as respondents, have violated the provisions of Section 5 of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in respect thereto as follows:

PARAGRAPH 1. Respondent Powernail Company is a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its main office and place of business in Prairie View, Illinois. It is now and at all times hereinafter mentioned has been the sole or exclusive distributor of patented machines and nails, respectively termed "powernailers" and "powercleats," which are used in the installation of various types of flooring and sheathing. The Powernail Company sells such products to approximately 5,000 dealers located in various States of the United States and the sales of such products are substantial.

Complaint

69 F.T.C.

PAR. 2. The EPA Manufacturing Company, is a limited partnership organized and existing under and by virtue of the laws of the State of Illinois, with its office and principal place of business located on the same premises as that occupied by respondent Powernail Company. The EPA Manufacturing Company is now, and at all times hereinafter mentioned, has been engaged in the business of manufacturing the aforementioned patented machines and nails which it sells to its sole or exclusive distributor, Powernail Company.

Respondent Edgar P. Anstett is the sole general partner of the EPA Manufacturing Company and is president of Powernail Company, and at all times mentioned herein has been primarily responsible in the formation, direction and control of the policies, practices and acts of the EPA Manufacturing Company and Powernail Company as hereinafter referred to.

PAR. 3. In the course and conduct of respondents' businesses, there has been at all times mentioned herein, and is now, a continuous and current movement of said machines and nails in interstate commerce, as "commerce" is defined by the Federal Trade Commission Act.

PAR. 4. The Powernail Company and EPA Manufacturing Company now, and at all times mentioned herein, have been in competition with other individuals, partnerships, corporations or firms engaged in the manufacture, distribution and sale of such flooring, sheathing and nailing equipment in interstate commerce except to the extent that such competition has been hindered, lessened, restricted, restrained and eliminated by the unlawful acts and practices hereinafter alleged. The aforementioned Powernail equipment has for the past several years achieved acceptance by flooring contractors, carpenters and other users thereof to such an extent that respondents have obtained a dominant position amounting to a virtual monopoly in the manufacture, distribution and sale of such flooring, sheathing and nailing equipment in the United States.

PAR. 5. For the several years last past, respondents have adopted and employed and still employ in the Milwaukee, Wisconsin area, and other areas of the United States, a system of establishing resale prices for Powernail products, which prices respondents required and still require Powernail dealers to observe as the respective resale prices to be charged by such dealers in reselling said products to the purchasers thereof.

PAR. 6. In order to carry out the said plan or policy, and to se-

1

Complaint

cure the cooperation therein of dealers generally, and in the Milwaukee, Wisconsin area in particular, respondents adopted and employed and still employ the following among other means by which respondents and those cooperating with them have undertaken to prevent and have prevented other dealers from selling said products at prices other than the said resale prices so established by respondents:

- (a) They issue resale price lists and dealer discount lists to the trade in which the various resale prices for said products are set forth and explained;
- (b) They make it generally known to the trade by letters and salesmen's interviews, and other means, that they expect and require dealers handling Powernail products to maintain and enforce said resale prices or such dealerships will be terminated;
- (c) They enter into informal agreements, understandings and arrangements with such dealers that as a condition of opening accounts for such dealers said resale prices are required to be maintained;
- (d) They invite, procure and solicit from dealers handling Powernail products, cooperation in submitting reports as to the failure of other dealers to observe and maintain said resale prices;
- (e) They invite, procure and solicit from dealers handling Powernail products, assistance and cooperation in ascertaining information pertaining to any dealers who resell such products to discontinued dealers or any other persons, firms or organizations which fail to maintain such resale prices;
- (f) They direct Powernail salesmen and other employees to secure information as to dealers who fail to observe said resale prices;
- (g) They use information received through Powernail salesmen, employees and dealers to induce and coerce such dealers as have failed to observe said resale prices to maintain the same in the future by exacting promises, assurances or agreements from them to that effect;
- (h) They threaten to refuse and do refuse to sell Powernail products to dealers failing to observe and maintain said resale prices;
- (i) They favor dealers who maintain said prices against competing dealers who fail to observe the same;
- (j) They employ Powernail salesmen and others to submit call reports which are placed in the appropriate ledger accounts of

such dealers informing respondents of all instances in which dealers handling Powernail products have failed to observe and maintain said resale prices;

(k) They have placed and still place inspection slips containing serial numbers in all orders filled for such dealers and have used and still use such serial numbers for the purpose, among others, of tracing sales made at below said resale prices;

(l) They have used and now use other equivalent cooperative means and methods for the enforcement of said system of resale prices; all with the result that said prices have been and are generally observed and maintained by dealers handling Powernail products.

PAR. 7. The above acts and practices have had and still have the capacity, tendency and effect of hindering, suppressing or eliminating competition between or among all dealers handling Powernail products to resell the same at prices fixed by respondents as aforesaid; such practices prevent dealers from selling these products at the prices they deem to be warranted; such practices have the capacity, tendency and effect to hinder and suppress all price competition in the resale of such products in various localities, including the Milwaukee, Wisconsin area, among others, thus tending to obstruct their free and natural flow of commerce in such products and the freedom of competition in this channel of interstate commerce.

PAR. 8. The aforesaid acts and practices of the respondents have the tendency to unduly hinder competition and have injured, hindered, suppressed, lessened or eliminated actual and potential competition, and thus are to the prejudice and injury of the public, constitute unfair methods of competition in commerce or unfair acts and practices in commerce, within the intent and meaning of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in

1

Order

the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Powernail Company is a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its main office and principal place of business located in Prairie View, Illinois.

EPA Manufacturing Company is a limited partnership organized and existing under and by virtue of the laws of the State of Illinois, with its office and principal place of business located on the same premises as that occupied by respondent Powernail Company, its exclusive distributor.

Respondent Edgar P. Anstett is the sole general partner of the EPA Manufacturing Company and is also president of Powernail Company. His address is the same as that of said companies.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I. *It is ordered*, that respondents Powernail Company, a corporation, and Edgar P. Anstett, individually, trading and doing business as EPA Manufacturing Company, and their officers, agents, representatives, employees, successors and assigns, directly or through any corporate or other device in connection with the offering for sale, sale or distribution of nailing equipment, including but not limited to that used in connection with flooring and sheathing, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from hindering, suppressing, or eliminating competition, or attempting to hinder, suppress or eliminate competition between or among dealers handling respondents' nailing equipment by:

1. Requiring purchasers or prospective purchasers to agree that they will resell at prices specified by respondents, or that they will not resell below or above such specified prices: *Provided, however*, That upon proper showing by res-

Order

69 F.T.C.

pondents that there are other commodities of the same general class produced by others in free and open competition with respondents' nailing equipment, the Commission will consider the terms of this Order in the light of such conditions;

2. Utilizing Powernail salesmen, or any other agents, representatives or employees, directly or indirectly, as part of any plan or program for maintaining resale prices, to report dealers who do not observe such suggested resale prices, or to act on reports so obtained by refusing or threatening to refuse sales to dealers so reported;

3. Harassing, intimidating, and coercing dealers into observing and maintaining resale prices;

4. Harassing, intimidating, coercing or threatening to refuse or refusing to sell Powernail products to dealers for failure to observe and maintain the resale prices;

5. Requesting dealers, either directly or through Powernail salesmen, agents, representatives or employees, to report any persons or firms who do not observe the resale prices suggested by respondents, or acting on reports so obtained by refusing or threatening to refuse sales to dealers so reported;

6. Requiring from dealers charged with price-cutting, promises or assurances of the observance of respondents' resale prices as a condition precedent to future sales to said dealers;

7. Refusing or failing to reinstate any former dealer terminated for reason, in whole or in part, of his past pricing practices, where such dealer requests reinstatement pursuant to the provisions of Paragraph III, *infra*, of this Order;

8. Utilizing any other cooperative means of accomplishing the maintenance of resale prices fixed by respondents for their products.

II. *It is further ordered*, That the respondents herein shall within sixty (60) days after service upon them of this Order, serve by mail a copy of this Order on all dealers of Powernail products.

III. *It is further ordered*, That the respondents herein shall:

(1) Within sixty (60) days after service upon them of this Order: (a) send each dealer terminated since January 1, 1960, a letter advising him that he may apply within thirty (30) days from receipt of that letter for reinstatement as a Powernail

1

Complaint

dealer; and (b) submit to the Commission a list of all dealers terminated since January 1, 1960; and, further that

(2) Within one hundred and twenty (120) days after service upon them of this Order: (a) submit to the Commission a list of all dealers who have been reinstated since service upon respondents of this Order; and (b) submit to the Commission a list of all dealers who have not been reinstated and the reason or reasons therefor.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this Order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this Order.

IN THE MATTER OF

I & S FUR COMPANY, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS

Docket C-1029. Complaint, Jan. 10, 1966—Decision, Jan. 10, 1966

Consent order requiring a New York City manufacturer of fur products to cease misbranding, deceptively invoicing, and falsely guaranteeing their furs in violation of the Fur Products Labeling Act.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that I & S Fur Company, Inc., a corporation, and Abraham Salzman, Ruben Salzman and Abraham Topkin, individually and as officers of the said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent I & S Fur Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Complaint

69 F.T.C.

Respondents are manufacturers of fur products with their office and principal place of business located at 115 West 29th Street, New York, New York.

Respondents Abraham Salzman, Ruben Salzman and Abraham Topkin, as officers of the corporate respondent, formulate, direct and control the acts, practices and policies of the said corporate respondent including those hereinafter set forth.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been and are now engaged in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have manufactured for sale, sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that they were falsely and deceptively labeled to show that fur contained therein was natural, when in fact, such fur was pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Section 4(1) of the Fur Products Labeling Act.

PAR. 4. Certain of said fur products were misbranded in that they were falsely and deceptively labeled or otherwise falsely or deceptively identified with respect to the name of the country of origin of furs contained in such fur products, in violation of Section 4(1) of the Fur Products Labeling Act.

PAR. 5. Certain of said fur products were falsely and deceptively invoiced by the respondents in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed to show the true animal name of the fur used in the fur product.

PAR. 6. Respondents furnished false guaranties that certain of their said fur products were not misbranded, falsely invoiced or falsely advertised when respondents in furnishing such guarantees had reason to believe that fur products so falsely guaranteed would be introduced, sold, transported or distributed in

Decision and Order

commerce, in violation of Section 10(b) of the Fur Products Labeling Act.

PAR. 7. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the Fur Products Labeling Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent I & S Fur Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 115 West 29th Street, New York, New York.

Respondents Abraham Salzman, Ruben Salzman and Abraham Topkin, are officers of the corporate respondent and their address is the same as that of said corporate respondent.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

Order

69 F.T.C.

ORDER

It is ordered, That respondents I & S Fur Company, Inc., a corporation, and its officers, and Abraham Salzman, Ruben Salzman and Abraham Topkin, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for introduction, into commerce, or the sale, advertising, or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Representing directly or by implication on labels that the fur contained in any fur product is natural when the fur contained therein is bleached, dyed, tipped or otherwise artificially colored.
2. Falsely or deceptively labeling or otherwise identifying any such fur product as to the country of origin of furs contained in such fur product.

B. Falsely or deceptively invoicing fur products by failing to furnish invoices, as the term "invoice" is defined in the Fur Products Labeling Act, showing in words and figures plainly legible all the information required to be disclosed in each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

It is further ordered, That I & S Fur Company, Inc., a corporation, and its officers, and Abraham Salzman, Ruben Salzman and Abraham Topkin, individually and as officers of the said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from furnishing a false guaranty that any fur product is not misbranded, falsely invoiced, or falsely advertised when the respondents had reason to believe that such product may be introduced, sold, transported, or distributed in commerce.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

Order

IN THE MATTER OF

MARTIN MARIETTA CORPORATION

MODIFIED ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 8280. Complaint, Jan. 27, 1961—Decision, Jan. 12, 1966

Order modifying a Commission consent order of divestiture dated March 12, 1963, 62 F.T.C. 834, by deleting from the list of properties to be divested the Greystone, North Carolina, quarry.

ORDER GRANTING IN PART, AND DENYING IN PART, APPLICATION
FOR MODIFICATION OF ORDER TO CEASE AND DESIST

Respondent, by an application filed September 23, 1964, supplemented by material filed March 1, 1965, and December 23, 1965, having requested the Commission to modify the consent order to cease and desist, issued March 12, 1963 [62 F.T.C. 834], by deleting eight quarries and quarry sites from the list of properties ordered to be divested by respondent; and the Commission, having fully considered said application and having concluded that there has been no showing made that changed conditions of fact or law or the public interest warrant modification of the order to cease and desist, except as hereinafter provided:

It is ordered, That respondent's application be, and it hereby is, granted in part, by deleting the Greystone, North Carolina, quarry from the properties required to be divested by respondent, listed in the order to cease and desist, issued March 12, 1963.

It is further ordered, That in all other respects respondent's application be, and it hereby is, denied.

Complaint

69 F.T.C.

IN THE MATTER OF

BEST PRODUCTS COMPANY, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-1030. Complaint, Jan. 12, 1966—Decision, Jan. 12, 1966*

Consent order requiring a Richmond, Va., dealer in miscellaneous merchandise to cease misrepresenting by means of catalogue advertisements that it is a wholesaler and sells at wholesale prices.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Best Products Company, Inc., a corporation, and Sydney Lewis, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Best Products Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia, with its office and principal place of business located at 4909-13 West Marshall Street, in the city of Richmond, State of Virginia.

Respondent Sydney Lewis is an individual and officer of the said corporate respondent. He formulates, directs and controls the policies, acts and practices of said corporate respondent, including those hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents have been, and are now, engaged in the advertising, offering for sale, sale and distribution of various articles of merchandise including jewelry, watches, silverware, cameras, kitchen utensils, household appliances, toys and sporting goods to retailers and to members of the consuming public.

PAR. 3. Respondents now cause, and for some time last past have caused, their said merchandise, when sold, to be shipped

Complaint

from their place of business in the State of Virginia to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents, in the course and conduct of their business, and for the purpose of inducing the purchase of their merchandise, have advertised the same by means of catalogs, disseminated by and through the United States mails to prospective purchasers located in various States other than the State of Virginia.

Among and typical, but not all inclusive, of the statements appearing in respondents' catalog are the following:

THE BEST BUYERS BOOK
WHOLESALE CATALOG

Confidential

HOW TO FIND
YOUR WHOLESALE COST

Your wholesale cost is hidden in the stock number that appears with each item. The figures at the right end of the stock number represent your wholesale cost as per example below:

EXAMPLE

1218-C1204 \$17.95

OUR STOCK NO.	YOUR COST \$12.04	RETAIL PRICE
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BEST PRODUCTS CO., INC. • Wholesale Distributors •

BEST'S SALES POLICY
WE SELL WHOLESALE ONLY

PAR. 5. Respondents, for each article of merchandise described in their catalog set forth two prices, one, a so-called coded price which is their selling price; and the other, a higher price, purported to be the "retail price." By means of such pricing methods, the aforesaid quoted statements, and other of similar import but not specifically set out herein, respondents represent, directly or by implication: (1) that they are wholesalers or wholesale distributors; (2) that they sell all of their merchandise at wholesale prices and that the so-called coded price is the wholesale price of each article of merchandise.

PAR. 6. In truth and in fact: (1) respondents are not wholesalers or wholesale distributors; (2) they do not sell all such articles of merchandise at wholesale prices and the so-called coded selling price is not the wholesale price of each article of merchandise but is substantially in excess thereof.

Decision and Order

69 F.T.C.

Therefore, the statements and representations as set forth in Paragraphs Four and Five hereof were and are false, misleading and deceptive.

PAR. 7. At all times mentioned herein respondents have been, and are in substantial competition, in commerce, with corporations, firms and individuals in the sale of merchandise of the same general kind and nature as that sold by respondents.

PAR. 8. The use by respondents of the aforementioned false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements were, and are, true, and into the purchase of substantial quantities of respondents' products because of said mistaken and erroneous belief.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Best Products Company, Inc., is a corporation organized, existing and doing business under and by virtue of the

laws of the State of Virginia with its office and principal place of business located at 4909-13 West Marshall Street, in the city of Richmond, State of Virginia.

Respondent Sydney Lewis is an officer of said corporation, and his address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the preceeding is in the public interest.

ORDER

It is ordered, That respondents Best Products Company, Inc., a corporation, and its officers, and Sydney Lewis, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of jewelry, watches, silverware, cameras, kitchen utensils, household appliances, toys, sporting goods, or any other merchandise to the ultimate consumer in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the term "wholesale" or "wholesale distributor" or any other word or words of similar import as descriptive of respondents' business or otherwise representing that respondents are wholesalers or wholesale distributors.

2. Using the words "wholesale," "wholesale cost" or any other term of similar import as descriptive of a selling price or representing directly or by implication that merchandise is being offered for sale at a wholesale price: *Provided, however,* That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that the price so described or referred to is the wholesale price in the trade area or areas where the representation is made.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

Complaint

69 F.T.C.

IN THE MATTER OF

BURSTEIN-APPLEBEE COMPANY ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-1031. Complaint, Jan. 12, 1966—Decision, Jan. 12, 1966

Consent order requiring a Kansas City, Mo., retailer of radios, phonographs, electronic equipment and other merchandise with stores in Missouri and Colorado, and also selling by mail-order catalog, to cease making deceptive pricing, savings, and guarantee claims in its advertising.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Burstein-Applebee Company, a corporation, and J. E. Burstein and Lee Marcus, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of the said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Burstein-Applebee Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 1012 McGee Street in the city of Kansas City, State of Missouri.

Respondents J. E. Burstein and Lee Marcus are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of radios, phonograph equipment, radio electronic equipment and general merchandise to the public. Respondents also own and operate retail stores in the States of Missouri and Colorado.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the States of Missouri and Colorado to purchasers thereof located in various other States of the United States and the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products and merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents, in the course and conduct of their business, and for the purpose of inducing the purchase of their products advertised the same by means of an annual catalog with periodic supplements and in newspapers of general interstate circulation. The newspaper advertising is primarily in conjunction with respondents' retail stores.

Said catalog and their supplements are distributed through the United States mail to customers located throughout the United States. Said catalog advertising is primarily in conjunction with the mail order phase of respondents' business.

PAR. 5. In their catalog advertising respondents have made certain statements and representations with respect to prices, savings and the guarantees of their products. Typical, but not all inclusive of such statements and representations, are the following:

SPECIAL PURCHASE SALE ON WORLD FAMOUS FISHER
COMPONENTS

Save \$60.00
X-100 40-Watt
Stereo Amplifier
Originally was \$159.50
\$99.50

X101B 56 Watt Stereo Amplifier
Save \$60.00
\$129.50

Originally Was \$189.50

500B 65-Watt FM Stereo Receiver
Save \$110.00
\$249.50

Originally Was \$359.50

BOGEN SOUND SPAN STEREO COMPONENTS

Bogen Model AP60 "Sound Span"
66-Watt Stereo Amplifier
Save \$110.00
Reg. Net Was \$249.95
\$139.95

Complaint

69 F.T.C.

FABULOUS B-A COMBINATION OFFER

Save \$160.00

AP60 Sound Span 66-Watt

Stereo Amplifier and

TP250 FM Stereo Tuner Both for
\$249.96 only**EMPIRE ZOOM BINOCULARS**

Mfg. List \$65.95

\$37.96

**GUARANTEED FOR LIFE NEW B-A ANTIMAGNETIC
17 JEWELLED WRISTWATCH**

PAR. 6. By and through the use of statements set forth in Paragraph Five hereof, and others of similar import not specifically set out herein, respondents represent, and have represented, directly or by implication, that:

a. The higher stated prices set out in said advertisements in connection with the terms "Regular," "Regularly," "Originally," "Was" and "Save" were the actual bona fide prices at which the articles referred to were offered to the public at retail by respondents on a regular basis for a reasonably substantial period of time in the recent regular course of business and that the difference between the higher prices and the lower prices set out in connection therewith represented savings to purchasers.

b. The said higher price amounts accompanied by the phrase "Mfg. List" were not appreciably in excess of the highest price at which said product has been regularly offered for sale in the recent regular course of business by a substantial number of the principal retail outlets in the trade area where such representations appeared.

c. The new "B-A Antimagnetic 17 Jeweled Wristwatch" is guaranteed for the life of the purchaser in every respect.

PAR. 7. In truth and in fact:

a. The higher stated prices set out in connection with the terms "Regularly," "Regular," "Originally," "Was" and "Save," were in excess of the actual bona fide prices at which the articles referred to were offered to the public at retail by respondents on a regular basis for a reasonably substantial period of time in the recent regular course of business, and the difference between the said higher prices set out in connection therewith and at which articles of merchandise are offered for sale did not represent savings to purchasers.

b. The higher prices set out in connection with the words "Mfg. List" were in excess of the highest price at which substantial

sales of the products were made by the principal retail outlets in representative communities throughout respondents' trade area at the time such representations were made.

c. Respondents do not guarantee the article of merchandise described in the advertisements for the life of the purchaser. The terms, conditions and extent to which the guarantees apply, and the manner in which the guarantor will perform thereunder are not disclosed in the advertisements.

Therefore, the statements and representations as set forth in Paragraphs Five and Six hereof were and are false, misleading and deceptive.

PAR. 8. In the course and conduct of their business, and at all times mentioned herein, respondents have been in substantial competition in commerce, with corporations, firms and individuals in the sale of the same general kind and nature of products sold by respondents.

PAR. 9. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices and hereinabove alleged has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations are true and into the purchase of substantial quantities of respondents' products and merchandise by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said

Order

69 F.T.C.

agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Burstein-Applebee Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 1012 McGee Street, in the city of Kansas City, State of Missouri.

Respondents J. E. Burstein and Lee Marcus are officers of the said corporation and their address is the same as that of the said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Burstein-Applebee Company, a corporation, and its officers, and J. E. Burstein and Lee Marcus, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of radios, phonograph equipment, radio electronic equipment or any other articles of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. (a) Using the words "Regularly," "Regular," "Originally" and "Was" or any other words or terms of similar import, to refer to any selling price of the respondents which is in excess of the actual bona fide price at which the article referred to was offered to the public by respondents in the recent, regular course of their business for a reasonably substantial period of time in the trade area where the representation is made; or otherwise misrepresenting respondents' former offering price of such merchandise to the public in the recent, regular course of their business in the trade area where the representation is made: *Provided, however,* That nothing herein shall prevent respondents from stating that

they have sold such merchandise in the regular course of their business at a designated higher price in the remote past if the time thereof is truthfully and conspicuously set forth together with all intervening reductions in price.

(b) Using the words "Mfg. List," or words of similar import, to refer to the price at which any product is generally sold by others, when such amount appreciably exceeds the highest price at which substantial sales of the product are being made by principal retail outlets in representative communities throughout respondents' trade area at the time such representation is made.

(c) Representing in any manner that by purchasing any of said merchandise, customers are afforded savings amounting to the difference between respondents' stated price and any other price used for comparison with that price, unless respondents have offered such merchandise for sale at the compared price in good faith for a reasonably substantial period of time in the recent regular course of their business, or unless substantial sales of said merchandise are being made or were made in the recent regular course of business by others in the trade area at the compared price, or a higher price, or unless a substantial number of the principal retail outlets in the trade area regularly offer the merchandise for sale at the compared price or some higher price, or when a comparable value representation is used, unless substantial sales of merchandise of like grade and quality are being made in the trade area at the compared price or a higher price and it is clearly and conspicuously disclosed that the comparison is with merchandise of like grade and quality.

(d) Misrepresenting in any manner the savings available to purchasers of respondents' merchandise.

Provided, however, That it shall be a defense in any enforcement proceeding instituted hereunder for violation of Paragraph 1(a), (b), (c), and (d) of this order arising out of alleged misrepresentations disseminated solely in the catalog, designated by respondents as Burstein-Applebee Company's 1966 catalog which was in the process of being printed at the time of entry of this order, if the respondents show that they transmitted flyers or other printed material to their entire subscription list, truthfully and nondeceptively correcting such alleged misrepresentations in prompt response to all requests therefor by the Commission.

Syllabus

69 F.T.C.

2. Using the word "Lifetime" or any other term of the same import to refer to any guarantee which is not for the duration of the life of the purchaser or original user without clearly and conspicuously disclosing the life to which such reference is made; or representing, in any manner, that the duration of a guarantee is other than respondents are able to establish is the fact.

3. Representing, directly or by implication, that any of respondents' products are guaranteed, unless the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

THE B. F. GOODRICH COMPANY AND TEXACO, INC.
(formerly The Texas Company)

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

*Docket 6485. Complaint, Jan. 11, 1956—Decision, Jan. 14, 1966**

Order, following a remand direction by the Supreme Court, opinion dated June 7, 1965, 381 U.S. 739, 7 S.&D. 1263, the Commission prohibits, for the second time, The B. F. Goodrich Company and Texaco, Inc. (formerly The Texas Company), from carrying out their sales commission agreement—under the agreement Goodrich paid Texaco a commission for promoting the sale of Goodrich tires, batteries, and automotive accessories (TBA) to its retail gasoline dealers—and from entering into sales commission arrangements with any other company.

On June 7, 1965, the Supreme Court vacated the judgment of the Court of Appeals, District of Columbia Circuit, dated July 30, 1964, 336 F. 2d 754, 7 S.&D. 956, which set aside the Commission's cease and desist order of April 15, 1963, 62 F.T.C. 1172.

*This order was modified on March 12, 1969, in conformance with a mandate of the Supreme Court, by deleting numbered paragraphs 5 and 6 of the order directed against Texaco.

OPINION OF THE COMMISSION

JANUARY 14, 1966

BY ELMAN, Commissioner:

On April 15, 1963 [62 F.T.C. 1172], the Commission held unlawful as an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act¹ a sales commission agreement between The B. F. Goodrich Company ("Goodrich") and Texaco, Inc. ("Texaco"). Under that agreement Goodrich pays Texaco a commission for promoting the sale of Goodrich tires, batteries, and automotive accessories ("TBA") to its retail gasoline dealers. By its order, the Commission enjoined Goodrich and Texaco from carrying out their agreement and from performing or entering into sales commission arrangements with any other companies. On review, the Court of Appeals for the District of Columbia Circuit set aside the Commission's order and directed the Commission to dismiss the complaint. *Texaco, Inc. v. F.T.C.*, 336 F. 2d 754 (D.C. Cir. 1964). On June 7, 1965, the Supreme Court granted certiorari, vacated the judgment of the Court of Appeals, and directed that the case be remanded to the Commission "for further proceedings, without the participation of Chairman Dixon, in light of *Atlantic Refining Co. v. Federal Trade Comm'n*, [381 U.S. 357 (1965)]." *F.T.C. v. Texaco, Inc.*, 381 U.S. 739, 740.

In *Atlantic*, the Supreme Court upheld (1) the Commission's decision that a sales commission agreement between Atlantic Refining Company and Goodyear Tire & Rubber Company was an unfair method of competition, and (2) the Commission's order prohibiting Atlantic and Goodyear from carrying out their agreement and from performing or entering into any other sales commission agreements. The Commission, without the participation of Chairman Dixon and Commissioner MacIntyre, has reviewed afresh the entire record in this proceeding, in the light of the Supreme Court's decision in *Atlantic*. We have concluded, for the reasons set forth below, that the sales commission agreement involved here is, in its fundamental operation and effect, indistinguishable from the one held unlawful in *Atlantic*, and that an order like the one affirmed by the Supreme Court in *Atlantic* should be entered here.

¹ Section 5 provides in relevant part:

"Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

Opinion

69 F.T.C.

I

An assessment of the relationship between this case and *Atlantic* requires a brief description of the events leading to this remand. This is one of three companion cases in which the Commission challenged, as an unfair method of competition, sales commission arrangements between major rubber companies and major oil companies. In *Goodyear Tire & Rubber Co.*, 58 F.T.C. 309, decided March 9, 1961, the Commission entered an order prohibiting Goodyear and Atlantic from employing sales commission plans. On the same day, in *Firestone Tire & Rubber Co.*, 58 F.T.C. 371, an identical order was entered against Firestone and Shell Oil Company. The Commission's order in *Goodyear* has been affirmed by the Supreme Court. *Atlantic Refining Co. v. F.T.C.*, 381 U.S. 357, affirming 331 F. 2d 394 (7th Cir. 1964). An appeal from the Commission's order in *Firestone* is pending in the Court of Appeals for the Fifth Circuit.

In both *Goodyear* and *Firestone* the Commission's reasoning was identical: It upheld the hearing examiner's finding that the oil companies used overt coercive tactics to force their dealers to buy the sponsored rubber companies' TBA products. But the Commission specifically declined to rest its decisions upon a finding of coercion or to limit its orders to injunctions against coercive tactics. Instead, it examined the unique degree to which the economic existence of gasoline dealers is dependent upon the good will of their major oil company suppliers, and concluded that the oil company "has sufficient economic power with respect to its . . . distributors to cause them to purchase substantial quantities of sponsored TBA even without the use of overt coercive tactics . . ." (58 F.T.C. at 364-65, 407.) The Commission regarded "overt acts of coercion as mere symptoms of a more fundamental restraint of trade inherent in the sales commission itself" (58 F.T.C. at 348, 398). Analyzing the actual operation of the sales commission plan in the context of the economic relationship between the oil company and its dealers, the Commission concluded that the competitive effects of the sales commission plan were like those of an illegal tying arrangement—it "presents a classic example of the use of economic power in one market (here, gasoline distribution) to destroy competition in another market (TBA distribution)" (58 F.T.C. at 367; see 58 F.T.C. at 406). Since the amount of commerce affected was "not insubstantial," the agreements were held unlawful.

However, in this proceeding involving the Goodrich-Texaco

sales commission plan, the Commission did not reach the same result. On the same day that it issued its orders in *Goodyear* and *Firestone*, the Commission held that although "Texaco has sufficient economic power over its wholesale and retail petroleum distributors to cause them to purchase substantial amounts of sponsored TBA even without the use of overt coercive tactics," the record did not contain "sufficient market data to enable the Commission to assess the competitive effects of the sales commission method of distributing TBA." The case was remanded to the hearing examiner for the taking of additional evidence on that issue. *B. F. Goodrich Co.*, 58 F.T.C. 1176, 1178-79, 1183.

This disposition was, at the very least, enigmatic: In *Goodyear*, the Commission found that the competitive effect of the sales commission plan, like a tying arrangement, was the foreclosure of the substantial TBA marketing outlets represented by Atlantic's dealers. This finding was based upon competing wholesalers' testimony that they were unable to sell to Atlantic dealers who feared that Atlantic would look with disfavor upon their purchase of any but Atlantic-sponsored TBA products. Having made this finding, the Commission made no analysis of "market data" other than to observe that the amount of commerce affected was "not insubstantial" since Atlantic had sold about \$50 million in sponsored TBA products during the period 1950-1956. (58 F.T.C. at 359-66) In *Goodrich* the Commission did not reject the hearing examiner's acceptance of the testimony of competing wholesalers regarding foreclosure of Texaco outlets, which was similar to, and as substantial as, that in *Goodyear*. The amount of commerce affected in *Goodrich* was considerably more substantial than that in *Goodyear*: in the five-year period 1952-1956 Texaco sold more than \$245 million in sponsored TBA, almost five times as much as was involved in *Goodyear* during a six-year period. What additional "market data" was required is unclear.²

On remand, after taking further evidence, the hearing examiner found that the sales commission plans had been shown to be an unfair method of competition, and entered an order identical to those previously entered in *Goodyear* and *Firestone*. An appeal was again taken to the Commission. By that time, the composition of the Commission had changed and only one of the Commission-

² In *Firestone* the Commission did consider market share data relating to the entire market for TBA, including data relating to other outlets for TBA other than service stations, and other methods of distributing TBA other than sales commission plans. But none of this information was present in *Goodyear*, and so presumably this was not the kind of "market data" deemed critical by the Commission to a finding of illegality.

Opinion

69 F.T.C.

ers (Commissioner Anderson) who had participated in the Commission's earlier decision remained on the Commission. On this second appeal to the Commission, much of the evidence introduced on the remand was challenged as incompetent or immaterial. The Commission concluded that the challenged evidence was unnecessary to its decision, and, with Commissioner Anderson dissenting, upheld the examiner's order.³ In its view, the legal principles under which the sales commission plans were held unlawful in *Goodyear* and *Firestone* were equally applicable to the *Goodrich* record, even without the challenged evidence (*B. F. Goodrich Co.*, Docket 6485, order issued April 15, 1963) [62 F.T.C. 1172].

On appeal, the Court of Appeals for the District of Columbia Circuit reversed and ordered that the complaint be dismissed.⁴ After holding that Chairman Dixon was barred from participating in the decision of the case, the Court of Appeals went on to reject the Commission's decision on the merits. It rejected the examiner's finding that Texaco employed coercive tactics and then held that "the Commission erred in concluding that Texaco has sufficient economic power over its dealers, without the use of coercive tactics, to cause them to buy substantial quantities of Goodrich TBA." (336 F. 2d at 762.) Instead, it found that Texaco dealers "are quite free to accept or reject" the oil company's "recommendation" to purchase sponsored TBA products (*id.* at 763).

The fundamental premise underlying this conclusion was the Court of Appeals' finding that there was "no basis in this record for the Commission's conclusion that Texaco has controlling economic power over its dealers" and that Texaco's "contracts with [its] dealers do not give rise" to an inference that it did. (*Id.* at 762.) In the court's view, the "promotional services" performed by Texaco were indistinguishable from, and no less lawful than, conventional salesmanship to wholly independent purchasers.

This approach conflicted with that of the Court of Appeals for the Seventh Circuit, which affirmed the Commission's order in *Goodyear*.⁵ For the Seventh Circuit the starting point for any realistic assessment of the nature and competitive effect of an oil company's "recommendations" under the sales commission plan was the economic power which the oil company possessed over its

³ We agree that the evidence challenged on the second appeal to the Commission is unnecessary to our decision and have stricken the Findings and Conclusions of the hearing examiner based upon it.

⁴ *Texaco, Inc. v. F.T.C.*, 336 F. 2d 754 (D.C. Cir. 1964).

⁵ *Goodyear Tire & Rubber Co. v. F.T.C.*, 331 F. 2d 394 (7th Cir. 1964).

dealers and which derived from the contractual relationship between them. In its view, the "heart of this case is the economic power Atlantic possesses over its service station dealers" (331 F. 2d at 400). Such power was not at all dependent upon coercive tactics.⁶ Rather, the "keystone" to that power could be found in the "lease and equipment loan contract with their short term and cancellation provisions." (*Ibid.*) Viewed in the context of these provisions, the "service station dealer is more of an economic serf than a businessman free to purchase the TBA of his choice." (*Ibid.*) Reaching an opposite conclusion from that of the District of Columbia Circuit in *Texaco*, the Seventh Circuit held (*id.* at 401) :

Atlantic's power to cause its dealers to carry either Goodyear or Firestone TBA does not depend upon overt coercive methods. The totality of facts surrounding the relationship between the oil company and the dealers points to one conclusion: the oil company is able to exert sufficient economic power over its dealers so that for all practical purposes they are required to carry sponsored TBA.

Atlantic says that its influence over its dealers to purchase sponsored TBA short of force, threat, or intimidation is lawful; that it may recommend high quality TBA to its dealers; and that such action serves a legitimate business purpose in the promotion of the sale of gasoline. This would be a persuasive argument except for the dealers' economic dependency upon the oil company. In that setting, recommendation is tantamount to command. Covert practices are as efficient as overt action. Sophisticated methods of pressuring the dealers into carrying sponsored TBA are as effectual as express covenants and open threats.

Supreme Court review was sought in both *Texaco* and *Atlantic-Goodyear*. The Commission, arguing that different dispositions of the two cases based upon narrow factual distinctions would be inappropriate, framed the issue presented by both cases in identical, broad terms, asking the Court to hold that:

[I]t is an unfair method of competition, in violation of Section 5 of the Federal Trade Commission Act, for a major rubber company and a major

⁶ The Seventh Circuit upheld the Commission's finding of coercion; the District of Columbia Circuit rejected it. The evidence of coercion in *Texaco* was no less substantial than that in *Atlantic-Goodyear*. The different results on appeal appear attributable to two factors: (1) the Seventh Circuit deferred to the hearing examiner's assessment of the witnesses' credibility, and (2) while only a few dealer witnesses testified to coercive tactics and a considerably larger number of dealers called by respondents testified to the contrary, the Seventh Circuit thought the hearing examiner correctly evaluated the entire testimony in light of the economic dependency of dealers upon the oil company. Review in the Supreme Court of the finding of coercion was not sought in *Atlantic*. To the extent respondents seek to distinguish this case from *Atlantic* on the presence or absence of coercion, we conclude that no such factual distinction exists; we do not disturb the examiner's finding of coercion which was based essentially on his assessment of the credibility of the witnesses. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 495-96. However, as we point out below, the fundamental issue here—the legality of sales commission agreements between major oil and major rubber companies—does not turn on a finding of coercion, and we do not rest our decision upon it.

Opinion

69 F.T.C.

oil company to enter into an agreement under which the oil company, in return for a commission, sponsors the sale of the rubber company's products to the oil company's retail dealers.⁷

In both cases the Commission urged the same broad rationale reflected by the Commission and Seventh Circuit decisions in *Good-year*: (1) Because of the gasoline dealer's singular dependence upon, and subservience to, his major oil company supplier, the oil company had the power to require its dealers to purchase substantial quantities of TBA without overt coercion; (2) the promotional services which the oil company was obligated to, and did, perform under the sales commission agreement constituted the exercise of that power for the benefit of the sponsored TBA supplier; and (3) as a result, the effect of the sales commission plan is like that of a tying agreement, foreclosing competing non-sponsored suppliers from the substantial market of the sponsoring oil company's dealers.⁸

The Supreme Court reviewed the *Atlantic-Goodyear* case for the purpose of resolving the "apparent conflict" with *Texaco* (381 U.S. at 363). The Court affirmed the Seventh Circuit's decision, and a week later vacated the judgment of the District of Columbia Circuit in *Texaco* and ordered that the case be remanded to the Commission for reconsideration in light of the decision in *Atlantic* (*F.T.C. v Texaco, Inc.*, 381 U.S. 739).

II

We turn then to the threshold question in this remand proceeding: What light is cast by the Supreme Court's decision in *Atlantic* upon the appropriate disposition of this case?

Reading its opinion against the background set forth above, we can draw only one conclusion: In upholding the Seventh Circuit and Commission decisions, the Supreme Court approved their broad rationale, rejected the approach taken by the District of Columbia Circuit in this case, and enunciated a rule which transcends the confines of the particular facts involved in *Atlantic*. In the Court's view, while coercive practices aggravate the restraint imposed by the sales commission plan, it is the oil company's power over its dealers, derived from the contractual relationship between them, and the utilization of that power through the performance of the promotional services required by the sales com-

⁷ *F.T.C. v. Texaco, Inc.*, *supra*, Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia, p. 2; *Atlantic Refining Co. v. F.T.C.*, *supra*, Brief for the Federal Trade Commission, p. 2.

⁸ *Atlantic Refining Co. v. F.T.C.*, *supra*, Brief for Federal Trade Commission, pp. 32-34; *F.T.C. v. Texaco, Inc.*, *supra*, Petition for a Writ of Certiorari, pp. 16-19.

mission agreement, which renders the sales commission plan unlawful.

The starting point for the Supreme Court's analysis, like the Seventh Circuit's, is reflected in its emphasis upon the oil company's considerable economic power over its dealers. The Court said (381 U.S. at 368):

[Atlantic and its dealers] simply do not bargain as equals. Among the sources of leverage in Atlantic's hands are its lease and equipment loan contracts with their cancellation and short-term provisions. Only last term we described the power implications of such arrangement in *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964), and we need not repeat that discussion here. It must also be remembered that Atlantic controlled the supply of gasoline and oil to its wholesalers and dealers. This was an additional source of economic leverage, *United States v. Loew's, Inc.*, 371 U.S. 38, 45 (1962)....

In this context, "threats and coercive practices" merely "bolstered" the "lever" which resulted from this economic power (*id.* at 369). The Court viewed the oil company's aggressive and vigorous salesmanship in carrying out the sales commission plan, wholly apart from any coercive tactics, as an exertion of "the persuasion that is a natural incident of its economic power" (*id.* at 368), rather than as the "recommendations" of a salesman to an independent purchaser "free to accept or reject" them.

Accordingly, the Court accepted the Commission's and the Seventh Circuit's characterization that the sales commission contract, which obligated the oil company to use its power over its dealers to sell the sponsored rubber companies' TBA, had the same "central competitive characteristic" as a tying agreement—"the utilization of economic power in one market to curtail competition in another." (*Id.* at 369.) Indeed, in the Court's view, that was its primary if not sole purpose. Under the sales commission plan (as the records in both *Atlantic* and *Texaco* show), the oil company, without making any investment in distributional facilities or TBA inventory, and without relieving the TBA supplier of the burden of sales, distribution, and service, is nevertheless paid large commissions for its promotional efforts. Accordingly, the Court found that "it is difficult to escape the conclusion that there would have been little point in paying substantial commissions to oil companies were it not for their ability to exert power over their wholesalers and dealers . . ." (*id.* at 376).

In sum, the Supreme Court, in upholding the Commission's

Opinion

69 F.T.C.

order prohibiting outright the use of the sales commission plan by Atlantic and Goodyear, was also affirming the rationale of the Commission's decision, which the Court described as follows (*id.* at 361) :

[T]he Commission considered the coercive practices to be symptomatic of a more fundamental restraint of trade and found the *sales-commission plan illegal in itself as* "a classic example of the use of economic power in one market . . . to destroy competition in another market . . ." (Emphasis supplied.)

At the same time the Supreme Court dispelled the ambiguities generated by the Commission's first decision in this proceeding. An assessment of the competitive effects of the sales commission plan does not require an analysis of "market data." Since the testimony only confirmed what was essentially implicit in the relationship between the oil company and its dealers—that the oil company's sponsorship under the sales commission plan has the competitive effect of foreclosing non-sponsored TBA suppliers from access to the market represented by the oil company's dealers—further market analysis is unnecessary. It is sufficient to show that a "not insubstantial portion of commerce is affected."⁹

To be sure, the Supreme Court took note of the striking demonstration in *Atlantic* of both the extreme abuses attending Atlantic's use of the sales commission plan, and the dramatic effectiveness of the plan in foreclosing non-sponsored TBA suppliers from the Atlantic service station market. *Atlantic* was the first case before the Court involving a challenge to the sales commission plan; it presented for review a Commission decision whose rationale would render unlawful the sales commission plans themselves, whenever used by major oil and rubber companies. The Court, therefore, made a careful examination of the entire record to assess the "economic and business stuff out of which these arrangements emerge," so as to determine whether they are "naked

⁹ The Court said in this regard (*id.* at 371): "Goodyear and Atlantic contend that the Commission should have made a far more extensive economic analysis of the competitive effect of the sales-commission plan, examining the entire market in tires, batteries and accessories. But just as the effect of this plan is similar to that of a tie-in, so it is unnecessary to embark upon a full-scale economic analysis of competitive effect. We think it enough that the Commission found that a not insubstantial portion of commerce is affected."

Atlantic had indeed based its contention that a more extensive economic analysis was necessary, in part, upon the Commission's first decision to remand *Goodrich-Texaco* to take evidence of "market data" for an assessment of the competitive effects of the sales commission plan. *Atlantic Refining Co. v. F.T.C., supra*, Brief of Petitioner The Atlantic Refining Company, pp. 31-32, 57, n. 48.

restraints of trade with no purpose except stifling of competition" and whether "they may be too dangerous to sanction" (*White Motor Co. v. United States*, 372 U.S. 253, 263). But, like the Commission, the Court looked upon the dramatic aspects of *Atlantic* as "symptomatic" of a broader problem. Having examined, as reflected by the record in *Atlantic*, the dangers presented by sales commission plans, their essentially anticompetitive character, and the vivid demonstration of the abuses which may attend their use, the Court concluded more generally that the sales commission plan itself "amount[s] to a device that permits suppliers of tires, batteries and accessories, through the use of oil company power, to effectively sew up large markets" and, as such, could not be defended even though it might be an efficient and economic method of distribution (381 U.S. at 371). Consequently, the Court's ultimate concern was not limited to the sales commission plan involved in *Atlantic*, but was rather with "the destructive effect on commerce that would result from the widespread use of these [sales commission] contracts by major oil companies and [TBA] suppliers" (*ibid.*).

The Court's concern in *Atlantic* with the dangers presented by the "widespread use" of the sales commission plans by major oil and TBA suppliers is especially significant. *Atlantic* was not, as the Court was well aware, an isolated case. In *Texaco*, in which a petition for certiorari was pending at the time of the Court's decision in *Atlantic*, the record showed that Texaco entered into sales commission plans with three of the leading rubber companies—Goodrich, Firestone and, under an agreement instituted about the time this proceeding began, U.S. Rubber Company. Goodrich also had sales commission plans with Continental Oil Company and other oil companies as well. The *Firestone* and *Goodyear-Atlantic* cases show that both Goodyear and Firestone have sales commission plans with Shell and Atlantic; that in addition, Goodyear has sales commission plans with Sinclair Refining Company, Richfield Oil Company, and a number of other oil companies; and that Firestone, in addition to its sales commission plan with *Texaco*, has sales commission arrangements with Union Oil Company, Continental Oil Company, and others.

The service station dealer outlets affected by these sales commission plans constitute a vast market for the sale of TBA; and at the same time only the largest rubber companies are the beneficiaries of the marketing advantages derived from the sales commission plans, a fact which would appear to confirm the Commiss-

Opinion

69 F.T.C.

sion's finding in *Atlantic* that smaller TBA suppliers are unable to utilize the sales commission arrangement (58 F.T.C. at 367). Given the Court's view of the fundamentally anticompetitive character of the sales commission plan when used by oil companies possessing power over their dealers, the proliferation of these plans between major oil companies and major rubber companies constitutes in itself an acute danger for competition. It was in this context that the Court, looking beyond *Atlantic*, and the specific facts involved there, concluded that generally the use of the sales commission plan by major oil companies and major rubber companies, whatever its economic advantages, is a practice "too dangerous to sanction."

This conclusion is buttressed as much by what the Court did, as by what it said. The Court's affirmance of the Commission's order prohibiting outright the use of sales commission plans by *Atlantic* and Goodyear not only between themselves but with other companies had broad competitive consequences in both the TBA and petroleum markets. If the Court's decision were to be read as limiting the Commission in its evaluation of other sales commission plans to the specific factual circumstances involved in *Atlantic*, one major oil and one major rubber company would be prohibited not only from further engaging in coercive tactics, but from using a sales commission plan which its major competitors might still be free to use.

For example, at the present time, it would appear that three of the largest rubber companies, Goodrich, Firestone, and U.S. Rubber, use sales commission plans providing Texaco sponsorship to promote their TBA products to Texaco's dealers. Yet, Goodyear could not ask Texaco (even assuming that Texaco has demonstrated no propensity to use coercive tactics in performing its other sales commission plans) to perform for it the same promotional service which Texaco performs for Goodyear's three major competitors. At the same time, Texaco, one of the largest oil companies, without making any investment in distributional facilities or TBA inventory, receives substantial commissions for the sale of TBA products to its service stations. *Atlantic*, a major oil company but substantially smaller than Texaco, is barred from the same economic opportunity, no matter how scrupulously it might refrain from coercive tactics in the future. Yet, the same kinds of leases, equipment loan contracts, and sales agreements stressed by the Court in *Atlantic* also render Texaco dealers economically subservient to, and dependent upon, Texaco; and its sales commis-

sion plans require Texaco to perform the same kind of vigorous promotional campaign described in *Atlantic*. To bar only Atlantic and Goodyear from the use of the sales commission plan would thus not only create a harmful competitive imbalance among the leading firms of the two industries, it would be arbitrary and inequitable.

The Supreme Court was informed of the harmful and anomalous consequence of a rule confined to the particular facts of *Atlantic*.¹⁰ We find nothing which would permit us to read the Court's opinion, or its remand order in this proceeding, as sanctioning such results.

III

In our view the Supreme Court's decision in *Atlantic* compels the conclusion that the Texaco-Goodrich plan is an unfair method of competition and that Texaco and Goodrich should be prohibited, as were Atlantic and Goodyear, from performing or entering into any other sales commission plans. The Court's concern for the dangers which derived from a widespread use of the sales commission plan is especially relevant here. As has been pointed out, Texaco is considerably larger than Atlantic. Its service station dealers constitute an even more significant TBA market. Stations operated by Texaco's lessee dealers¹¹ and contract dealers¹² constituted 16.5% of the service stations in the United States in the year 1955. In that year, Texaco had approximately six times as many contract and lessee dealers as Atlantic.¹³

Moreover, as we have noted, in *Atlantic* the total sales to At-

¹⁰ The Government in its petition for certiorari in *Texaco* told the Court: "Even if the cases [Atlantic and Texaco] could be distinguished on their facts, the conflict, if unresolved, would create an anomalous situation in which one major oil company and a large tire company were permitted to employ essentially the same marketing practice that their competitors were prohibited from using."

F.T.C. v. Texaco, Inc., 381 U.S. 739, Petition for a Writ of Certiorari, p. 12.

Similarly, Atlantic told the Supreme Court that:

"The order in each of the two cases represents a rule of general application, not the disposition of an isolated controversy. The rule should be uniform throughout the industry. Moreover, Atlantic and Texaco are competitors; and Atlantic, the smaller company, should not be under a marketing handicap as against Texaco, which is three times larger." *Atlantic Refining Company v. F.T.C.*, *supra*, Brief of Petitioner The Atlantic Refining Company, p. 34.

¹¹ A lessee station (referred to as a C station) is one that is either owned or leased by Texaco and in turn leased by it to the dealer.

¹² A contract station (referred to as D stations) is either owned by the operator or leased by him from someone other than Texaco. In addition to selling gasoline directly through C and D stations, Texaco sells indirectly through consignees (B accounts) and independent distributors (E accounts), who operate bulk storage plants, purchase Texaco products and sell them to service station dealers and consumers.

¹³ In 1955 Texaco had approximately 30,000 contract and lessee dealer stations; Atlantic had approximately 5,000 service stations. 381 U.S. at 363.

Opinion

69 F.T.C.

lantic dealers of Goodyear and Firestone products for the six-year period June 1950-June 1956 amounted to about \$50 million. Goodrich and Firestone sold almost \$60 million in TBA products to Texaco dealers in the year 1956 alone. In the five-year period 1952-1956, the sales of the sponsored Goodrich and Firestone TBA to Texaco amounted to approximately \$245 million.

The economic dependence of Texaco dealers is no different from that of Atlantic dealers. Thus, Texaco lessee dealers, who constitute the most important segment of service station TBA outlets, have the same kind of short term leases, renewable on a year-to-year basis and terminable at year's end upon ten days' notice of either party. These leases contain the same kind of general "housekeeping" requirements concerning the station's use, maintenance and appearance which, if breached, can result in immediate cancellation by Texaco without notice to the lessee. The lessees have often made a considerable investment in their stations, at times, on funds borrowed from Texaco. "Contract dealers," who own their stations or lease them from third parties, nevertheless lease their pumps and other equipment from Texaco. Both lessee and contract dealers purchase their gasoline pursuant to an "Agreement of Sale," prescribing annual minimum and maximum purchases at current Texaco prices. These "Agreements of Sale" also are generally on a year-to-year basis, terminable at year's end upon thirty days' notice, and automatically cancelled if a lessee dealer's lease is terminated.

In these circumstances, the competitive advantage given a TBA supplier whose products are sponsored by Texaco need hardly depend upon the use of overtly coercive tactics. Here, as in *Atlantic*, Texaco's "promotional" efforts in carrying out its sales commission agreement with Goodrich and Firestone constitute a forceful exercise of its economic power over its dealers. Its consequence is to impress upon Texaco dealers, through constant repetition and in a variety of ways, that Texaco, whose favor the dealer must court, has a strong interest in their purchase of the sponsored TBA products.

Even before the dealer has been accepted, Texaco begins its campaign on behalf of the sponsored TBA products. Texaco personnel, when interviewing prospective dealers for new or established service stations, advised them of the importance of TBA, recommending the TBA products of Goodrich and Firestone. Once the dealer is selected, and before he opens his station, Texaco frequently informs Goodrich and Firestone of the prospective open-

ing of his station, affording Goodrich and Firestone a head start over competitors in the initiation of their own sales campaign on behalf of their products. Thereafter, Texaco, often with the direct assistance and participation of the rubber companies, maintains a continuous campaign designed to induce the dealer to purchase the sponsored TBA products. Dealer meetings and training courses designed to educate the dealer in the use of TBA products utilize the products of the sponsored companies. Texaco participates in the sponsored companies' seasonal and special sales, promotional and advertising campaigns. Texaco publications sent to its dealers carry displays of the sponsored TBA products. And, perhaps most effective of all, the Texaco salesman continually carries the message in his day-to-day contacts with the dealers. In this regard, it is important to remember that these Texaco salesmen, who are most directly involved in pushing the sponsored TBA products, also play a critical role in the annual dealer evaluations and in the determination of whether the dealer's lease and contractual relations with Texaco are to be renewed. At the same time, Texaco, in making promotions, evaluates these salesmen's performances in part by their success in selling sponsored TBA products.

Frequently, both the Texaco and rubber company salesmen call upon the dealer together ("double teaming"). The Supreme Court in *Atlantic* noted the inherently coercive effect of that device, pointing out that since "the annual dealer evaluation by Atlantic salesmen carried substantial weight when the district managers decided upon annual lease extensions . . . dealers were . . . understandably susceptible to the encouragement of Goodyear salesmen when Atlantic men were nearby looking over their shoulders." (381 U.S. at 375.) And, as in *Atlantic*, each dealer's performance as a purchaser of sponsored TBA is also fully disclosed by the reports furnished by the sponsored rubber companies to Texaco of the amount of sponsored TBA purchased by each dealer. As the record indicates, Texaco, in accessing the economic success of service stations, was vitally concerned with the amount of sponsored TBA sold by its dealers.

Here, as in *Atlantic*, there was substantial testimony by non-sponsored TBA suppliers confirming the conclusion that, as a result of Texaco's vigorous sales campaign to its dealers, many Texaco dealers were left with the impression that Texaco would look with disfavor upon their purchase of non-sponsored TBA products and that they were required to purchase the sponsored TBA.

Opinion

69 F.T.C.

As a result, these non-sponsored suppliers were unable to gain access to these Texaco service station outlets. In sum, the Supreme Court's characterization of the operation of the sales commission plan in *Atlantic* is equally applicable here. Texaco, with Goodrich's "encouragement and assistance, has marshalled its full economic power in a continuing campaign to force its dealers and wholesalers to buy [Goodrich] products" (*id.* at 371).

Respondents argue that there are a number of factual distinctions between this case and *Atlantic*. But as we read *Atlantic* none of these distinctions is material. As already demonstrated, under *Atlantic* it is the oil company's power over its dealers, and the exercise of that power through the performance of the promotional services required by the sales commission agreement, and not coercive tactics, which condemns the sales commission plan. And while, unlike *Atlantic*, the sales commission plans involved here did not allocate territories between the sponsored TBA suppliers, the gravest danger to competition presented by the sales commission plans here as in *Atlantic* is in their capacity for hindering competition between sponsored and non-sponsored TBA suppliers. A device which may enhance the position of two or three leading TBA suppliers vis-a-vis smaller competitors cannot be defended on the ground that it still leaves these few firms free to "compete" with one another for access to the Texaco service station market.

Respondents also argue that, unlike *Atlantic*, there is here no showing that Texaco's promotional campaign was effective. Thus, they contend that the statistics show that only about 30% of Texaco's dealers purchased sponsored TBA products. This figure, however, is derived by considering the number of Texaco dealers purchasing sponsored TBA in proportion to the total number of lessee and contract dealers. In fact, however, as respondent Goodrich, itself, points out,¹⁴ many contract dealers do not handle, and are not appropriate outlets for, TBA products. Since more than half of the total number of Texaco dealers are made up of contract dealers, the actual success of Texaco's sales commission plans would appear to be considerable indeed. But, under *Atlantic*, proof of the actual effectiveness of the sales commission plan is unnecessary. The Court's ultimate concern was with the cumulative danger presented by the "wide-spread use" of the plans, rather than the relative effectiveness of particular plans. More-

¹⁴ Brief of Respondent The B.F. Goodrich Company, In Answer to Appeal Brief of Counsel Supporting the Complaint, dated March 28, 1960, p. 28.

over, the Court viewed the sales commission plan when used by a major oil company as having the same competitive characteristics as a tying agreement. As in the case of a tying agreement, the fact that the sales commission plan has not fully achieved its purpose, or that nonsponsored suppliers can overcome the unfair competitive advantage which the sales commission gives the sponsored supplier, is no defense. *Cf. International Salt Co. v. United States*, 332 U.S. 392, 397; *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 12; *Osborn v. Sinclair Refining Co.*, 286 F. 2d 832, 838 (4th Cir. 1960), cert. denied 366 U.S. 963.

In essence, respondents urge upon us the rationale of the District of Columbia Circuit's opinion—that despite the economic dependence of the Texaco dealer upon Texaco, Texaco's vigorous promotional activities under the sales commission plan are nothing more than the "recommendations" of a salesman to a purchaser "free to accept or reject" them. In affirming the Seventh Circuit's decision in *Atlantic*, the Supreme Court rejected that position.

IV

We think that orders against both Texaco and Goodrich, identical with the orders against Atlantic and Goodyear which were affirmed by the Supreme Court, are appropriate here. Texaco should clearly be enjoined from entering into or performing any sales commission plan. As to Goodrich, like Goodyear, it was "no silent or inactive partner in the implementation of the sales-commission plan" (381 U.S. at 373). As the record demonstrates, the sales commission plan here is essentially a joint effort in which the massive power of a major rubber company and a major oil company is united, to the disadvantage of non-sponsored competitors, behind the sale of the rubber company's TBA products. Goodrich now has sales commission plans with five other oil companies: Continental, Shell-American, Jenney, Ohio Oil and Emblem. Its sales commission plans with these companies are substantially the same as those it has with Texaco. There is nothing in this record to indicate that these oil companies do not also have the kind of economic power possessed by Texaco over its dealers. We would not be justified in concluding that any of these other plans, unlike Goodrich's plan with Texaco, was not an attempt to buy the economic power of the oil company over its dealers in order to obtain an unfair competitive advantage over competing rubber companies. The order therefore prohibits Goodrich from

Final Order

69 F.T.C.

entering into or carrying out any sales commission plan. If Goodrich should come forward with facts establishing that it has a sales commission plan with any oil company which does not possess economic power over its dealers, the proceeding can always be reopened for such modification of the order as may be warranted. See *Atlantic Refining Co. v. F.T.C.*, *supra*, at 377.

Chairman Dixon and Commissioner MacIntyre did not participate in this decision.

FINAL ORDER

By its order dated June 16, 1965, the Court of Appeals for the District of Columbia Circuit remanded this case to the Commission for further proceedings in conformity with the opinion of the Supreme Court herein dated June 7, 1965 [7 S.&D. 1263]. Pursuant thereto, the Commission heard oral argument and received written briefs, and fully considered, on the basis of the entire record, all questions of fact and law presented by the appeals from the hearing examiner's revised initial decision of September 24, 1962 [62 F.T.C. 1172, 1177]. For the reasons stated in the accompanying opinion of the Commission,

It is ordered, That:

A

The revised initial decision of the hearing examiner be, and it hereby is, modified as follows:

(1) Findings 10(b), 32, 33, 34, and conclusion 7 are stricken. [62 F.T.C. at 1182, 1191, 1192, 1194]

(2) The first sentence of finding 8 [62 F.T.C. at 1181] is deleted, and the following is substituted therefor: "Tires, batteries, and accessories have become a necessary and integral part of the business operation of the ordinary Texaco dealer, and in particular for Texaco's lessee dealers."

(3) The last sentence of finding 20 [62 F.T.C. at 1187] is deleted, and the following is substituted therefor: "It would be unusual to expect that a Texaco salesman would vigorously insist to a dealer that he had a right to buy wherever he might wish when Texaco's evaluation of the salesman's performance was in part based upon his success in selling sponsored TBA products to the dealer."

(4) The second sentence in finding 26 [62 F.T.C. at 1189] is deleted, and the following is substituted therefor: "There are written contracts with Texaco, Conoco, and Ohio-Marathon, but

there are no formal contracts with the other three oil companies, which are smaller local concerns. Shell-American and Jenney operate generally with only service station customers selling at the retail level, but without wholesale outlets such as consignees, jobbers, and distributors."

(5) The second sentence in finding 30 [62 F.T.C. at 1190] is deleted, and the following is substituted therefor: "From 1952 to the end of 1955, the number of Conoco leased stations increased from 1,138 to 1,765."

(6) The last sentence of finding 31 [62 F.T.C. at 1190-1191], and the chart immediately below, are deleted, and the following substituted therefor: "Outlets of the additional oil companies having sales commission contracts with Goodrich during the years 1953-55 were as follows:

	12-31-53	12-31-54	12-31-55
Conoco	1061	1272	1508
Shell-American	53	66	60
Jenney Mfg.	138	188	201
Ohio Oil	594	666	804
Emblem	30	9	25
	<u>1876</u>	<u>2201</u>	<u>2598</u> ^s

(7) The first sentence of conclusion 5 [62. F.T.C. at 1194] is deleted, and the following is substituted therefor: "Practically all of the representatives of the competitors of Goodrich called as witnesses testified generally that they had difficulty in selling TBA to Texaco stations and testified specifically as to the reasons given by certain Texaco dealers for not buying or selling their TBA items."

B

The hearing examiner's revised initial decision of September 24, 1962 [62. F.T.C. 1172, 1177], as hereinabove modified and supplemented by the accompanying opinion, and the order contained in said revised initial decision be, and they hereby are, adopted as the decision and order of the Commission.

C

The respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form of their compliance with this order.

Chairman Dixon and Commissioner MacIntyre not participating.

Complaint

69 F.T.C.

IN THE MATTER OF

OGUS, RABINOVICH & OGUS, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION AND THE FUR
PRODUCTS LABELING ACTS

Docket C-1032. Complaint, Jan. 14, 1966—Decision, Jan. 14, 1966

Consent order requiring a New York City retailer of fur products to cease falsely invoicing its fur products by omitting and abbreviating required information and deceptively advertising said products, including mink hats, by using fictitious pricing claims.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Ogus, Rabinovich & Ogus, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Ogus, Rabinovich & Ogus, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Respondent is a retailer of fur products with its office and principal place of business located at 304 East 45th Street, New York, New York.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondent has been and is now engaged in the introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and has sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were falsely and deceptively invoiced by the respondent in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed to show the true animal name of the fur used in the fur product.

PAR. 4. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth on invoices in abbreviated form, in violation of Rule 4 of said Rules and Regulations.

(b) The term "natural" was not used on invoices to describe fur products which were not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Rule 19(g) of the said Rules and Regulations.

(c) Required item numbers were not set forth on invoices, in violation of Rule 40 of said Rules and Regulations.

PAR. 5. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that certain advertisements intended to aid, promote and assist, directly or indirectly in the sale, and offering for sale of such fur products were not in accordance with the provisions of Section 5(a) of the said Act.

Among and included in the advertisements, but not limited thereto, were advertisements of respondent which appeared in issues of the Knoxville News—Sentinel, a newspaper published in the city of Knoxville, State of Tennessee.

By means of the aforesaid advertisements and other advertisements of similar import and meaning not specifically referred to herein, respondent falsely and deceptively advertised fur products, in violation of Section 5(a)(5) of the Fur Products Labeling Act and Rule 44(a) of the Rules and Regulations promulgated thereunder by representing, directly or by implication through statements appearing in newspapers such as "Sale Mink Hats—3 Days Only! Friday, Saturday and Monday—\$19.90—Regularly \$29.99 to \$39.99," that the prices of such fur products were reduced from the actual bona fide prices at which the respondent

Decision and Order

69 F.T.C.

offered the products to the public on a regular basis for a reasonably substantial period of time in the recent regular course of business and the amount of such purported reductions constituted savings to purchasers of respondent's fur products. In truth and in fact the alleged former prices were fictitious in that the said fur products were not reduced in price as represented and savings were not afforded purchasers of respondent's fur products as represented.

PAR. 6. In advertising fur products for sale, as aforesaid, respondent made pricing claims and representations of the types covered by subsections (a), (b), (c), and (d) of Rule 44 of the Regulations under the Fur Products Labeling Act. Respondent in making such claims and representations failed to maintain full and adequate records disclosing the facts upon which such claims and representations were based, in violation of Rule 44(e) of said Rules and Regulations.

PAR. 7. The aforesaid acts and practices of respondent, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

The commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act and the Fur Products Labeling Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has not violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said

agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Ogus, Rabinovich & Ogus, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 304 East 45th Street, New York, New York.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Ogus, Rabinovich & Ogus, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices as the term "invoice" is defined in the Fur Products Labeling Act, showing in words and figures plainly legible all the information required to be disclosed in each of the subsections of Section 5(b) (1) of the Fur Products Labeling Act.
2. Setting forth information required under Section 5(b) (1) of the Fur Products Labeling Act and Rules and Regulations promulgated thereunder in abbreviated form.
3. Failing to set forth the term "natural" as part of the information required to be disclosed on invoices under the Fur Products Labeling Act and Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed or otherwise artificially colored.
4. Failing to set forth on invoices the item number or mark assigned to fur products.

Complaint

69 F.T.C.

B. Falsely or deceptively advertising fur products through the use of any advertisement, representation, public announcement or notice which is intended to aid, promote and assist, directly or indirectly, in the sale, or offering for sale, of any fur product, and which:

1. Uses the word "regularly" or words of similar import, to refer to any amount which is in excess of the price at which such merchandise has been sold or offered for sale in good faith by the respondent in the recent regular course of its business, or otherwise misrepresents the prices at which such merchandise has been sold, or offered for sale by respondent.
2. Misrepresents in any manner the savings available to purchasers of respondent's fur products.

C. Making claims and representations of the types covered by subsections (a), (b), (c), and (d) of Rule 44 of the Rules and Regulations promulgated under the Fur Products Labeling Act unless there are maintained by respondent full and adequate records disclosing the facts upon which such claims and representations are based.

It is further ordered, That the respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF
HOUSE OF LORD'S, INC.

ORDER, OPINIONS, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
SEC. 2(d) OF THE CLAYTON ACT

Docket 8631. Complaint, June 30, 1964—Decision, Jan. 18, 1966

Order requiring a New York City manufacturer of ladies' dresses to cease discriminating among its competing retail customers in paying promotional allowances to some and not to others in violation of Section 2(d) of the Clayton Act.

COMPLAINT

The Federal Trade Commission, having reason to believe the party respondent named in the caption hereof, and hereinafter

more particularly described, has violated and is now violating the provisions of subsection (d) of Section 2 of the Clayton Act, as amended, (U.S.C., Title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent, House of Lord's, Inc., formerly trading as Lord's Sportswear, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 498 Seventh Avenue, New York, New York.

PAR. 2. Respondent is now and has been engaged in the manufacture, sale, and distribution of ladies' dresses. Respondent sells its products to a large number of retail specialty and department stores located throughout the United States. Respondent's sales of its products are substantial, having exceeded \$1,573,000 for the calendar year ending 1960.

PAR. 3. In the course and conduct of its business, respondent has engaged and is now engaging in commerce, as "commerce" is defined in the Clayton Act, as amended, in that respondent sells and causes its products to be transported from its principal place of business located in the State of New York, to customers located in other States of the United States and in the District of Columbia. There has been at all times mentioned herein a continuous course of trade in commerce in said products across State lines between said respondent and its customers.

PAR. 4. In the course and conduct of its business in commerce, respondent paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondent, and such payments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of respondent's products.

PAR. 5. Included among the payments alleged in Paragraph Four were credits or sums of money paid either directly or indirectly by way of discounts, allowances, rebates or deductions as compensation or in consideration for promotional services or facilities furnished by customers in connection with the offering for sale or sale of respondent's products, including advertising in various forms such as newspapers, sometimes hereinafter referred to as promotional allowances.

For example, during the years 1961 and 1962, respondent made

Initial Decision

69 F.T.C.

payments and allowances to various customers in various cities, including Washington, D.C.; Cleveland, Ohio, and San Francisco, California, for advertising its products in newspapers. In Washington, during the year 1961, respondent paid Julius Garfinckel & Co. and Lewis & Thomas Saltz, Inc., promotional allowances in the amounts of \$200 and \$100, respectively, and during the year 1962 paid the same customers \$150 and \$100, respectively. In Cleveland, during the year 1961, respondent paid The Halle Bros.; Lota Kelly Sportswear, Inc., and The Higbee Co. promotional allowances in the amounts of \$300, \$100 and \$300, respectively, and during the year 1962, paid the Halle Bros. and Lota Kelly Sportswear, Inc., \$200 and \$75, respectively.

Respondent did not make, or offer to make, or otherwise make available such allowances on proportionally equal, or any, terms to all other customers in Washington, D.C., and Cleveland competing with those who received such allowances.

PAR. 6. The acts and practices of respondent, as alleged above, are in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, Sec. 13).

Mr. Peter J. Dias, Mr. Myer S. Tulkoff, and Mr. Jay M. Rosen for the Commission.

Handelsman, Arutt & Knox, New York, N.Y., by Mr. Maxwell Handelsman for respondent.

INITIAL DECISION BY WILMER L. TINLEY, HEARING EXAMINER
FEBRUARY 11, 1965

The Federal Trade Commission, on June 30, 1964, issued and subsequently served its complaint, charging the respondent with violations of subsection (d) of Section 2 of the Clayton Act, as amended. Answer to the complaint, filed on August 11, 1964, admitted the essential factual allegations of the complaint, except the allegation that the challenged advertising allowances were not made available on proportionally equal terms to all customers competing with those who received such allowances.

A joint prehearing conference, which was nonpublic, was held on September 21, 1964, with counsel for the parties in this and certain other proceedings involving similar charges, and a separate prehearing conference, which was for the public record, was held on September 24, 1964, with counsel for the parties in this proceeding. Pursuant to leave granted by the Commission, hearings were held in New York, New York, on November 16 and 17;

in Washington, D.C., on November 18 and 19; in Cleveland, Ohio, on November 23; and were concluded in New York, New York, on November 30, 1964.

Seventeen witnesses were presented by counsel supporting the complaint, and three by counsel for respondent, one of the latter having previously been presented by counsel supporting the complaint. The transcript of testimony (Tr.), including the public prehearing conference, consists of 645 pages. The evidence also includes 48 Commission's Exhibits (CX), 4 Respondent's Exhibits (RX), and several stipulations of fact by counsel. In accordance with the time granted by the hearing examiner, proposals were filed by counsel on or before January 4, 1965, and reply proposals were filed by counsel supporting the complaint on January 18, 1965. No reply proposals were filed by counsel for respondent.

After having considered the record in this proceeding, including the proposals and contentions of the parties, the hearing examiner issues this initial decision. Findings proposed by the parties which are not adopted herein, either in the form proposed or in substance, are rejected as not being supported by the record or as involving immaterial or unnecessary matter. The motion to dismiss made by counsel for respondent at the conclusion of the hearings, upon which decision was reserved, is disposed of by this initial decision. The specific references herein to the testimony and exhibits, and to other parts of the record, are intended to be convenient guides to the principal items of evidence supporting findings of fact, and do not represent complete summaries of the evidence which was considered in such findings.

FINDINGS OF FACT

1. Respondent, House of Lord's, Inc., is a corporation organized under the laws of the State of New York, with its office and principal place of business located at 498 Seventh Avenue, New York, New York (Answer). It was originally incorporated in 1936 under the name Lord's Sportswear, Inc., which was changed to its present name in August 1963 (Tr. 59-60).

2. Respondent is now and, during the times herein referred to, has been engaged in the manufacture, sale and distribution of ladies' dresses (Answer). Although respondent manufactures dresses of many different fabrics, and for all seasons of the year (Tr. 478-9, 573-8, 599-60), the evidence herein relates only to its practices in connection with the sale of Viyella dresses, that is,

Findings of Fact

69 F.T.C.

dresses containing a wool-and-cotton fabric identified with the trade name "Viyella" (Tr. 29-32; CX 5, 6 et al.).

3. It was stipulated that the same practices followed by respondent in the sale of Viyella dresses are also followed by respondent in the sale of dresses containing linen (Tr. 29-32. See also Tr. 601-2). Accordingly, insofar as findings herein are made with respect to respondent's practices in connection with Viyella dresses, they apply also with respect to its practices in connection with dresses containing linen.

4. Respondent sells its products to a large number of retail specialty and department stores located throughout the United States. Its sales are substantial, having exceeded 1,573,000 for the calendar year ending 1960 (Answer), and having amounted to approximately \$1,600,000 for each of the calendar years 1961 and 1962 (Tr. 60).

5. The record does not disclose respondent's annual sales of Viyella dresses, but it is clear that such sales were substantial. During the years 1961 and 1962, respondent sold its products to about 1500 to 2000 customers, and approximately 350 of them were Viyella customers (Tr. 80, 604-5). The evidence discloses sales of Viyella dresses during those years to individual customers ranging from \$150 to \$44,510 (Tr. 85-9; 544), and the money available and used for allowances to respondent's customers for Viyella advertising in 1961 amounted to approximately \$16,000, and in 1962 to approximately \$12,000 (Tr. 76, 508-9).

6. In the course and conduct of its business, respondent has engaged and is now engaging in commerce, as "commerce" is defined in the Clayton Act, as amended, in that respondent sells and causes its products to be transported from its principal place of business located in the State of New York, to customers located in other States of the United States and in the District of Columbia. There has been at all times mentioned herein a continuous course of trade in commerce in said products across State lines between said respondent and its customers (Answer).

The Issues

7. The complaint alleged generally that respondent granted disproportionate advertising payments or allowances to competing customers in violation of subsection (d) of Section 2 of the Clayton Act, as amended, and as examples, alleged that such allowances were made during the years 1961 and 1962 to customers located in Washington, D.C., Cleveland, Ohio, and San Francisco,

Findings of Fact

California (Pars. 4 and 5). During the prehearing procedures, the evidence with respect to advertising allowances granted by respondent was limited to the years 1961 and 1962 (Prehearing Order, Par. 3), and, in the course of the hearings, counsel supporting the complaint offered evidence of such allowances only with respect to customers operating retail stores in Washington, D.C. and Cleveland, Ohio.

8. It was stipulated that payments and allowances by respondent to customers for advertising Viyella products included the following: Abercrombie & Fitch, \$500 in each of the years 1961 and 1962; Robert Kirk, Ltd., \$116 in 1961, and \$160 in 1962; and I. Magnin & Co., \$890 in each of the years 1961 and 1962 (Tr. 7). These three customers operate retail stores in San Francisco, California (CX 3A-L, 14-16, 27-32, 38-40), but no evidence was offered concerning advertising allowances to other Viyella customers operating retail stores in San Francisco, and counsel supporting the complaint do not rely upon these allowances as evidence of violations (CSC Proposals, Par. 10). The allowances to these three customers will, therefore, be disregarded.

9. The issues are, accordingly, limited to respondent's Viyella advertising allowances in 1961 and 1962 to customers operating retail stores in Washington, D.C., and Cleveland, Ohio, with the stipulation that the same practices are followed by respondent in the sale of dresses containing linen. It was stipulated that competing customers in Washington and Cleveland bought goods of like grade and quality at or about the same time during the years 1961 and 1962 (Tr. 3, 153-4). In the context of the record, these stipulations are construed to mean, not that all customers of respondent in Washington and Cleveland were competing customers, but that insofar as the evidence relates to competing customers of respondent, they bought Viyella dresses of like grade and quality at or about the same time.

10. Counsel supporting the complaint urge that during 1961 and 1962 respondent did not offer or make available Viyella advertising or promotional allowances to all competing customers in Washington, D.C., and Cleveland, Ohio, on proportionally equal terms. They urge that the allowances were not proportionally equal among the competing customers who received them, and that they were not offered or made available to the competing customers who did not receive them (CSC Proposals, Par. 10, pp. 7-8).

11. Counsel for respondent contends that each customer who

Findings of Fact

69 F.T.C.

participated in the Viyella advertising program in 1961 and 1962, "possessed and exercised the right to determine the advertising media to be used, the size, contents and cost of the advertisement and the time when the said advertisement should appear" (CR Proposals, Par. 24); and that each customer who did not participate was offered an equal opportunity to do so, but refused (CR Proposals, Pars. 25-30). He contends, therefore, that in 1961 and 1962 respondent made its Viyella advertising allowances available on proportionally equal terms to all of its competing customers in Washington, D.C., and Cleveland, Ohio (CR Proposed Conclusions, Pars. B-C).

Peck & Peck and Best & Company

12. Counsel for respondent also contends, in effect, that respondent's advertising allowances to two customers with respect to which evidence was offered, Peck & Peck and Best & Company, should be disregarded as possible violations. The facts in evidence, and respondent's contentions concerning these two customers warrant preliminary consideration.

13. It was stipulated that payments and allowances for advertising Viyella products were made by respondent to Peck & Peck of \$2,000 in 1961, and \$300 in 1962; and to Best & Company of \$447 in 1961, and \$500 in 1962 (Tr. 7). Respondent's sales of Viyella dresses to Peck & Peck amounted to \$44,510 in 1961, and to \$9,950 in 1962; and to Best & Company, amounted to \$8,768 in 1961, and to \$10,497.50 in 1962 (Tr. 212-3).

14. During 1961 and 1962, Peck & Peck operated approximately 60 retail stores, two of which were in Washington, D.C., and three in Cleveland, Ohio (Tr. 183-4); and Best & Company operated 17 or 18 retail stores, one of which was in Washington, D.C., and one in Cleveland, Ohio (Tr. 157-60). Some of the Viyella dresses purchased by these customers from respondent were resold by them in their Washington and Cleveland stores (Tr. 163, 174, 185-7, 200-1, 207-8).

15. All sales of Viyella dresses by respondent to Peck & Peck and to Best & Company were made by sales representatives of respondent in New York dealing with representatives of those customers also in New York (Tr. 90-1); and the negotiations with respect to advertising allowances by respondent to those customers also occurred in New York (Tr. 97-9, 117). All deliveries of Viyella dresses by respondent were made from its plant in New York to the warehouse of each of those customers, also in New

York (Tr. 63-4, 70-1, 119); and all Viyella dresses sold in the various stores of Peck & Peck and Best & Company were delivered to those stores by Peck & Peck and Best & Company, respectively, from their New York warehouses (Tr. 166-7, 180-1, 199-200, 206-8). The allowances were used by Peck & Peck for advertising in the *New Yorker*, a nationally distributed magazine, in 1961, and by Best & Company in both 1961 and 1962 (CX 13, 36, 37).

16. Counsel for respondent does not seriously contend that the advertising allowances by respondent to Peck & Peck and Best & Company are beyond the jurisdiction of the Commission under subsection (d) of Section 2 of the Clayton Act, as amended, because of the intrastate nature of the sales and deliveries by respondent to those customers (Tr. 65-9, 362-9; CR Proposals, Pars. 20-23). An extensive legal analysis of this point, accordingly, is not warranted. It should be noted, however, that this subsection applies if the transaction with either the favored or unfavored customer is in interstate commerce (*Corn Products Refining Co., et al. v. F.T.C.*, 324 U.S. 726, 745 (1945); *Shreveport Macaroni Mfg. Co., Inc. v. F.T.C.*, 321 F.2d 404, 408-9 (1963), cert. den. 375 U.S. 971; *In the Matter of J. H. Filbert, Inc.*, 54 F.T.C. 359, 369-71 (1957)); and that respondent's sales and shipments of Viyella dresses to customers located in Washington, D.C., and Cleveland, Ohio, were clearly in interstate commerce.

17. Counsel for respondent does seriously contend that respondent's advertising allowances to Peck & Peck and to Best & Company should be disregarded as possible violations because respondent's sales and deliveries of Viyella dresses to those customers in New York City in 1961 and 1962 were made "with no knowledge on the part of the Respondent or its officers that any of the Viyella dresses would be shipped" by those customers to their stores in Washington, D.C., or Cleveland, Ohio. (CR Proposals, Pars. 21, 23. See also Tr. 65-9, 362-9). Apparently on this basis respondent contends that "Peck & Peck and Best & Co. in 1961 and 1962 were not competing customers in Washington, D.C. or Cleveland, Ohio." (CR Proposed Conclusions, Par. D).

18. In considering a similar contention the Commission stated in its opinion of June 26, 1964, in Docket No. 7226, *In the Matter of Flotill Products, Inc.* [65 F.T.C. 1099, 1144]:

But a seller is under an obligation to affirmatively offer or otherwise make available promotional allowances on proportionally equal terms to all customers who compete in the resale of its goods. This obligation entails whatever inquiry is necessary to establish whether customers in fact compete. If it

Findings of Fact

69 F.T.C.

were otherwise, sellers could avoid their obligations under the statute simply by closing their eyes to the obvious. A violation of Section 2(d) is determined by objective rather than subjective considerations. If the favored and nonfavored customers actually compete in the resale of the seller's goods, the Act may be violated without regard to the seller's knowledge of the lawfulness or unlawfulness of a disproportionate promotional allowance. To hold otherwise would recognize the right of a seller to discriminate in favor of or against any customer who conducts his resale operations in more than one trade area.

19. The record in this proceeding, however, makes it abundantly clear that in selling Viyella dresses to Peck & Peck and to Best & Company respondent had compelling reason to believe that they would be resold by those customers at their branch stores, including specifically their stores in Washington, D.C., and Cleveland, Ohio.

20. Respondent knew that both customers had stores in Washington and Cleveland (Tr. 68, 70-1, 95-6), and that both advertised Viyella dresses in the New Yorker, a magazine of national distribution (CX 13, 36, 37; Tr. 96-9, 116, 125-6). It also understood that, because of the quantities purchased, Viyella dresses would be sold in more than one store of both of those customers (Tr. 118-9). After the advertising appears in the New Yorker, copies are sent to respondent, and those advertisements indicate that the products are available in the various stores of those customers, including their stores in Washington and Cleveland (CX 13, 36, 37; Tr. 96-100, 162-3, 167-8, 174-5, 184-7, 199-201, 206-8). When respondent made an allowance to Best & Company in 1962, it had seen the 1961 New Yorker advertisement of that customer (CX 36; Tr. 99-100). Since that advertisement disclosed that Viyella dresses were available in substantially all of the stores of Best & Company in 1961, respondent must necessarily have assumed that the same situation would occur in 1962. From the implications of the testimony as a whole, the hearing examiner is satisfied that respondent had a sufficient history of dealing with both customers, and that it dealt with them on a sufficiently informed basis, to understand that it was their policy to have available in substantially all of their stores the merchandise which they advertised nationally.

21. Because of the foregoing circumstances, and because the hearing examiner is convinced that the official of respondent responsible for its advertising program was thoroughly acquainted with the advertising and sales policies of Peck & Peck and Best & Company with respect to Viyella dresses (Tr. 366), it is found that, when respondent granted advertising allowances to those

Findings of Fact

customers, it fully anticipated that such dresses would be resold in substantially all of their stores, including their stores in Washington, D.C., and Cleveland, Ohio.

*Other Customers in Washington, D.C.,
and Cleveland, Ohio*

22. In addition to Peck & Peck and Best & Company, the only customers operating retail stores in Washington, D.C., and Cleveland, Ohio, who received allowances from respondent in 1961 and 1962 for advertising Viyella dresses, together with the amounts of their purchases of Viyella dresses from respondent and the allowances which they received in those years, are shown in the following list (Complaint and Answer; Tr. 45, 85-7) :

	1961		1962	
	Pur.	Allow.	Pur.	Allow.
<i>Washington, D.C.</i>				
Julius Garfinckel	\$2000	\$200	\$2000	\$150
Lewis & Thomas Saltz	1000	100	1000	100
<i>Cleveland, Ohio</i>				
The Halle Brothers	\$4500	\$300	\$1500	\$200
Lota Kelly Sports-wear, Inc.	1250	100	1250	75
The Higbee Company	1250	300	750	None

23. Customers who purchased Viyella dresses from respondent in 1961 and 1962, and who received no allowance for advertising them, included: in Washington, D.C., Virginia Simmons, Inc., and Dorothy Stead, Inc., each of whose purchases of Viyella dresses in each year amounted to \$200, and Lelia Noyes Shop, whose purchases in each year amounted to \$250; and in Cleveland, Ohio, Anne Polshek Shop, whose purchases in each year amounted to \$400, and Frocks and Bonnets and Milgrim Stores, each of whose purchases in each year amounted to \$150 (Tr. 86-9, 544).

Competition Among Viyella Customers

24. In cases too numerous to warrant citing in detail, the Commission has found, on the basis of varying kinds and quantities of proof, and with respect to different lines of business, that retailers of the same commodities located in the same city or local area, or in reasonable proximity, are in competition with each other. (See particularly *Standard Motor Products, Inc.*, 54 F.T.C. 814, 828, and other automotive replacement parts cases, and such cases as *Elizabeth Arden, Inc.*, 39 F.T.C. 288, 301; and *Liggett & Myers Tobacco Company, Inc.*, 56 F.T.C. 221, 248.) In its opinion of January 11, 1965, *In the Matter of Sunbeam Corporation*, Docket

Findings of Fact

69 F.T.C.

No. 7409 [67 F.T.C. 20, 53], the Commission articulated what appears to be its accumulated knowledge and experience with respect to the reality of such competition, in ruling, in effect, that when it was shown that "favored and disfavored customers were located in the same local trade area . . . the burden shifted to respondent of producing evidence that such customers were not, in fact, competing in the distribution of articles covered by the plan." The record in this proceeding, however, contains substantial persuasive evidence with respect to competition among respondent's Viyella customers operating retail stores in Washington, D.C., and in Cleveland, Ohio.

25. The dress buyer of Peck & Peck identified Best & Company as a competitor in Washington and Cleveland. She also identified Halle Brothers as a competitor in Cleveland, and Garfinckel in Washington, and expressed the view that competitors of Peck & Peck included all other stores in those cities selling the same items (Tr. 203-4).

26. The dress buyer of Garfinckel considered that store to be in competition with Peck & Peck and Best & Company in Washington "In that all stores carrying ready-to-wear are in competition" (Tr. 220). The owner of Virginia Simmons, Inc., who operates a very small "personal type of shop," which she described as a boutique (Tr. 517), stated that her customers came from all parts of the Washington area, including the suburbs, and that she is in competition with any store in the area that sells the same merchandise (Tr. 531-6).

27. Miss Anne Polshek, who operates a small store out of the congested downtown area of Cleveland (Tr. 424-5), stated that the back of her store "faces the back" of the Peck & Peck store (Tr. 415). The buyer for Halle Brothers considered that store to be in general competition with other retail stores in the Cleveland area engaged in selling ready-to-wear merchandise, including Peck & Peck and Best & Company (Tr. 397). The owner of Lota Kelly Sportswear, Inc., in Cleveland, considered that he was in competition with Peck & Peck and with Best & Company (Tr. 440-1).

28. The contrary testimony on this point was limited and unpersuasive. Neither the advertising director nor the buyer of misses' dresses of Best & Company knew whether or not that company's Arlington, Virginia store was considered competitive with stores located in Washington (Tr. 160, 178); and the latter did not consider the Arlington store of Best to be in competition with its

Washington store (Tr. 181). The former manager and buyer of Lelia Noyes Shop, which is a small retail store in Washington, felt that the small shops, which have an entirely different clientele, are not in competition with the big downtown stores such as Garfinckel's and Lewis & Thomas Saltz; but she indicated that a woman may go to any store to shop for clothes, and that the same general class of customers might go to her shop or to Garfinckel's for that purpose (Tr. 308-9).

29. Respondent's customers, who received allowances for advertising Viyella dresses in 1961 and 1962, advertised such dresses exclusively in newspapers and magazines (Tr. 7-8). Viyella advertising by Best & Company in both years was in the New Yorker, a magazine of national distribution (CX 36, 37; Tr. 178); and such advertising by Peck & Peck in 1961 was in the New York (CX 13; Tr. 211-12. Also see Tr. 509 which indicates that the 1962 advertising of Peck & Peck was in a newspaper, but does not indicate where). Viyella advertising in 1961 and 1962 by other customers in Washington and Cleveland was in newspapers of general circulation throughout those areas (CX 4-9, 33-35). Customers located throughout the United States read the New Yorker, and, in person or by correspondence, may shop for Viyella dresses in any of the stores of Peck & Peck or Best & Company (Tr. 200), and customers located throughout the Washington and Cleveland areas read the newspapers of general circulation in those areas, and, in person or by correspondence or telephone, may shop for Viyella dresses in any of the stores advertising in those newspapers (Tr. 244-63).

30. The record herein discloses, therefore, that the customers of respondent operating retail stores in Washington, D.C., who received allowances for advertising Viyella dresses in 1961 and 1962, competed, in the sale of Viyella dresses of the same grade and quality, with each other and with customers of respondent in Washington, D.C., who did not receive such allowances. It also discloses such competition among and between respondent's Viyella customers operating retail stores in Cleveland, Ohio, who did and did not receive Viyella advertising allowances in 1961 and 1962.

The Viyella Cooperative Advertising Program

31. The Viyella fabric is manufactured by William Hollins & Company (hereinafter referred to as Hollins) in England (Tr. 74). Respondent purchases this fabric from Hollins and uses it in

the manufacture of Viyella dresses at its plant located in New York, New York, from which it then distributes the dresses to its customers located throughout the United States (Tr. 60-1).

32. Formerly Hollins advertised Viyella in this country in nationally distributed magazines, and otherwise, without referring to the retail stores in which Viyella dresses were sold. Approximately ten years ago, upon the recommendation of respondent, Hollins and respondent adopted the program of cooperative advertising by retailers which is here in issue (Tr. 119-20).

33. Each year Hollins makes available to respondent an amount of money for use in the program based upon respondent's estimates of its probable needs, with latitude for exceeding that amount by a reasonable sum (Tr. 74-5, 508-18). The program is administered by respondent, and it has full responsibility for determining the policy under which the advertising funds are utilized, providing only that the word "Viyella" is prominently displayed in all advertising (Tr. 74-6, 602-4).

34. During the years here in issue, respondent's advertising allowances to customers have not exceeded the amount allowed to it by Hollins, and it has had available all of the money it desired for the program. Respondent has been reimbursed by Hollins for the full amount which it has allowed to customers for the cooperative advertising of Viyella (Tr. 74-5, 114-5, 498, 499-501, 504, 508-18, 593).

35. During the years 1961 and 1962, respondent granted payments or allowances to its customers for advertising Viyella dresses for resale (Tr. 28), equal to one-half of the cost to the customer of such advertising (Tr. 74, 81, 468, 548), excluding production costs such as art work, agency fees, etc. (Tr. 168, 221, 453, 460). Respondent did not prescribe the form or content of the advertising to be used by the customer, requiring only that the word "Viyella," be prominently mentioned (Tr. 76, 82, 564-5). It also endeavored to have the customer refer to House of Lord's in the advertising, but this was not a requirement (Tr. 82-3). During 1961 and 1962, the only allowances made by respondent for Viyella advertising were for advertising in newspapers and magazines (Tr. 7-8), but it had no requirement limiting customers to those media, and had no objection to contributing to other forms of advertising (Tr. 74, 77-80, 108-11, 548, 564).

36. Respondent's contribution to Viyella advertising was not based upon the customer's volume of purchases, and no limit was placed upon the amount which respondent would contribute. The

cost of the advertising was left entirely to the customer, and was limited only by the amount which it was willing to pay as its share (Tr. 80-1, 564-5, 592-3, 597). It was respondent's conception that customers, who made large advertising expenditures, would purchase in large volume; and that, since the customer was expending an equal amount of its own funds, the judgment and self-interest of the customer would keep the amount of the allowance which it received in reasonable relationship to the volume of Viyella dresses which it purchased (Tr. 121).

Proportionally Equal Terms

37. The Commission has stated that a plan for providing payment for promotional services and facilities "must be honest in its purpose and fair and reasonable in its application" (*Lever Brothers Co.*, 50 F.T.C. 494, 512 (1951); Docket No. 7904, *Sunbeam Corporation*, Comm. Op. 1-11-65) [67 F.T.C. 20, 53], and the Supreme Court has pointed out with apparent approval "that the Commission has indicated a willingness to give a relatively broad scope to the standard of proportional equality under §§ 2(d) and 2(e)." (*FTC v. Simplicity Pattern Company, Inc.*, 360 U.S. 55, 61, fn. 4 (1959)).

38. This broad scope was emphasized by the Commission in Guide 7 of its 1960 Guides for Advertising Allowances (1 CCH, pp. 6073, 6076), which states, in part, that:

. . . payments or services must be proportionalized on some basis that is fair to all customers who compete. No single way to proportionalize is prescribed by law. Any method that treats competing customers on proportionally equal terms may be used.

One of the approved examples under that guide states:

A seller may properly offer to pay a specified part (say 50%) of the cost of local newspaper advertising up to an amount equal to a set percentage (such as 5%) of the dollar volume of purchases during a specified time.

39. In *Vanity Fair Paper Mills, Inc. v. F.T.C.*, 311 F. 2d 480, 486 (1962), the Court stated:

Although the test of proportional equality can be met by a plan conforming to any one of the three basic types described in the Report of the Attorney General's Committee on the Antitrust Laws, 189 (1955), or, we should suppose, by a combination of them, still other methods may comply.

One of the methods there specifically approved is the "payment of a dollar allowance per unit of promotional service rendered by each buyer, up to a uniform maximum percentage of his dollar volume" (fn. 6).

Findings of Fact

69 F.T.C.

40. In its 1960 Guides, *supra*, the Commission specifically approved as proportionally equal a 50% cooperative advertising allowance up to 5% of a customer's purchases, with the clear implication that the latter figure was tentative and flexible; and apparently the same principle was approved by the Court in *Vanity Fair Paper Mills, Inc.*, *supra*. Respondent's plan meets those standards except that it does not set a limit upon the percentage of a customer's purchases which it will grant as an advertising allowance.

41. In actual practice respondent's allowance to one customer in 1961 represented 24% of its purchases, and, without explanation in the record (Tr. 413), no allowance was made to that customer in 1962; a customer, whose allowance in 1961 represented approximately 7% of its purchases, received approximately 13% in 1962; and otherwise the allowances in 1961 and 1962 ranged from approximately 5% to 10% of each customer's purchases of Viyella dresses (CSC Proposals, Par. 52).

42. Counsel have not cited, and the hearing examiner has not found, any reported decision by the Commission or the courts concerning the propriety of a plan which sets no limit upon the percentage of a customer's purchases which may be granted under a cooperative advertising plan. It is conceivable, of course, that a plan without such a limit may be abused by a customer willing to undertake expenditures to advertise its own name wholly out of proportion to its purchases of the products of the contributing supplier. In the absence of any showing of such an abuse, or of some basis for anticipating its likelihood, however, it seems reasonable to expect that the fact that the customer must expend an equal amount of its own funds will constitute an effective brake upon the cost of the cooperative advertising which it will undertake, and will keep such cost in reasonable relationship to its volume of purchases of the advertised product.

43. No circumstances have been disclosed in the record tending to indicate that any customer has endeavored to utilize respondent's cooperative advertising to obtain an unreasonably high allowance, or that respondent has endeavored to tailor its plan to favor any particular customer or group of customers, or to exclude others. The hearing examiner is convinced that respondent's plan is "honest in its purpose" to grant allowances on a basis which will most effectively promote the sale of Viyella dresses, and that it is designed to achieve a reasonable relationship between the al-

lowances received and the volume of Viyella dresses purchased by customers who participate in the plan.

44. It is the opinion of the hearing examiner, therefore, that, in principle, respondent's plan for granting Viyella advertising allowances satisfies the "proportionally equal" requirements of Section 2(d). Determination of whether or not the plan is "fair and reasonable in its application" must depend upon the evidence concerning the manner and extent to which it was made available to customers competing in the retail sale of Viyella dresses.

Availability Generally

45. Viyella is used in respondent's fall line of ladies' dresses which is usually ready for display to respondent's sales staff about the end of March. A meeting is then held, at which members of the sales staff are informed, among other things, that advertising money is available from Hollins, and at which they are instructed "to go full force" in offering the cooperative advertising program to every Viyella customer (Tr. 112-3, 467-8, 547-51, 594). The instructions do not limit the program to newspaper advertising, but include any type and amount of advertising which the customer desires to use (Tr. 548, 564). Failure by a sales person to comply with such instructions would result, first, in reprimand and correction, and a second offense would be cause for dismissal (Tr. 584-5, 595). Except for the instance involving Lewis & Thomas Saltz (Pars. 55-61 herein), it has never come to respondent's attention that its staff may have failed to offer the program to any Viyella customer (Tr. 595-7).

46. No written or printed announcements of the Viyella cooperative advertising program are sent to respondent's customers, and the program is made known to them only by the oral offers of respondent's sales staff (Tr. 81-2). Other than the fact that respondent will share half the cost of any advertising the customers desire to use, these offers are largely in general terms, and it is clear that there is little suggestion by respondent concerning the various forms of advertising which the customers may use (Tr. 109-11, 471-4, 478, 561-2).

47. The extent to which respondent's sales staff complied with its instructions to offer the cooperative advertising to each of its Viyella customers, and whether or not the offers which were made were in fact in accordance with respondent's principle of proportional equality, must be judged on the basis of the evidence with respect to twelve customers operating retail stores in Wash-

Findings of Fact

69 F.T.C.

ington, D.C., and Cleveland, Ohio, in 1961 and 1962, six of whom received allowances, and six of whom did not (Pars. 13, 22-23 herein). No evidence was offered concerning the circumstances under which an additional customer in Cleveland, Ohio, The Higbee Company, received an allowance in 1961, but not in 1962 (Tr. 413; CX 22; Also see Par. 22 herein). The circumstances with respect to each of these twelve customers are discussed separately below.

Availability to Specific Customers

48. When the buyer for Peck & Peck placed Viyella orders, she knew the advertising program was available. Either when placing its 1961 order, or at a later date, Peck & Peck decided to run a full page advertisement in the New Yorker. It asked respondent to contribute \$2000 as half of the cost of this advertising, and this amount was allowed. The cost, form and content of the advertising, and the media to be used, were not limited by respondent, but it accepted the determinations which were made by Peck & Peck (Tr. 7, 97-8, 197-9, 204-6). In 1962, Peck & Peck decided to advertise Viyella in a newspaper, and not in the New Yorker, and received an allowance of only \$300 from respondent (Tr. 7, 509).

49. Respondent's advertising program was offered to Best & Company without any limitation upon the cost of the Viyella advertising to be used, or upon the form or content of the advertisements or the media to be employed, and no formula was prescribed which related the amount of respondent's allowance to the volume of merchandise purchased (Tr. 99, 164-6, 168, 178-9).

50. Julius Garfinckel & Co. received a Viyella advertising allowance of \$200 in 1961, and of \$150 in 1962, toward the cost of its newspaper advertising (Par. 22 herein). Counsel supporting the complaint contend that these amounts were fixed by respondent, and that this customer was not offered whatever amounts it wanted, conditioned only on the requirement that it would contribute like amounts (CSC Proposals, Pars. 17-21).

51. The Garfinckel buyer testified on direct examination that respondent paid 50% of the cost of Garfinckel's 1961 and 1962 Viyella advertising, but fixed the maximum amounts which respondent would contribute (Tr. 216-7). She said that in 1961 the amount of \$200 was set by respondent and confirmed by its letter of July 12, 1961, fixing that limit (Tr. 218-9; CX 21).

52. On cross-examination, however, she disclosed a high degree

44

Findings of Fact

of uncertainty concerning the circumstances under which the \$200 limit was fixed in respondent's letter of July 12, 1961. Without clearly remembering, she agreed that the limit must have been fixed by respondent only after she submitted an estimate that the cost of the advertising would be \$400 (Tr. 230-2, 238. See also Tr. 235). She also testified, with respect to 1961 and 1962, that a limit was not fixed by respondent in advance of receiving her estimate, and that respondent did not place any restrictions upon the advertising which she desired to use (Tr. 232-3). The size of the advertisement to be used was determined by Garfinckel without any restrictions by respondent (Tr. 227-30, 241). It was her opinion that, within reasonable limits, respondent would have shared half the cost of almost any advertising she desired to use (Tr. 240-1). The allowance which she received from respondent was all that she desired (Tr. 241).

53. The president of respondent, who wrote the letter of July 12, 1961, testified that when the Garfinckel buyer made her Viyella purchases in 1961, he offered to pay half of the cost of the advertising she desired to use. She subsequently advised him by telephone that she intended to spend \$400, and he agreed to pay \$200 of that amount. He then wrote the letter confirming that conversation (Tr. 590-2). The same procedure was followed in 1962, and he did not place a limit in the first instance upon the amount to be spent for the advertising (Tr. 592-3).

54. It is the opinion of the hearing examiner that these witnesses testified concerning the circumstances under which respondent made allowances to Garfinckel's to the best of their recollections, and that any inconsistencies in their testimony were due to uncertain memory. On the basis of his appraisal of this testimony, and the record as a whole, he is satisfied that respondent's cooperative advertising offers to Garfinckel in 1961 and 1962 were not limited as to amount, and that the limit stated in respondent's letter of July 12, 1961, was simply an adoption by respondent of one-half the cost of the advertising which Garfinckel independently decided to use. Certainly the record falls far short of establishing that this was a limit initially fixed by respondent.

55. In each of the years 1961 and 1962 Lewis & Thomas Saltz received a Viyella advertising allowance of \$100 (Par. 22 herein). Counsel supporting the complaint contend, however, that the 1962 allowance was not offered to this customer by respondent, but was obtained only after a protest and request by the customer; and that since the 1962 allowance was given on the basis of the

Findings of Fact

69 F.T.C.

amount allowed in 1961, it did not necessarily reimburse the customer for 50% of the cost of its advertising (CSC Proposals, Pars. 22-24).

56. Lewis & Thomas Saltz had been receiving Viyella cooperative advertising allowances from respondent for many years, and it was well aware of respondent's policy to pay 50% of the cost of such advertising (Tr. 277, 282-3; CX 18). In August 1961 Saltz employed Miss Helen Francis as Manager of its Women's Department. When she made her first purchases of Viyella in 1962, she was not aware of respondent's cooperative advertising program, and did not ask for it (Tr. 265-6, 268). She testified that the allowance was not offered to her in 1962 (*id.*), and that if it had been offered, she immediately would have taken it up with the advertising manager (Tr. 269). Respondent's saleswoman who dealt with Miss Francis in 1962, testified, however, that she distinctly remembered offering the Viyella advertising to Miss Francis, and explaining the program to her (Tr. 554-5).

57. This directly conflicting testimony by each of these witnesses is equally credible. Each was confronted with the problem of accurately recalling a relatively isolated incident of their employment which had occurred more than two years previously, and each had a similar motivation to testify to the proper performance of her responsibilities. From observing them the hearing examiner does not believe that either deliberately fabricated her testimony.

58. It is the opinion of the hearing examiner, however, that since Saltz was well aware of, and desired to participate in, respondent's cooperative advertising program, it had a responsibility to instruct its new employee concerning the matter. This was not done (Tr. 276). Failure by respondent's saleswoman affirmatively to offer the allowance in these circumstances, if it occurred, could scarcely be considered concealment.

59. When Miss Francis reported to the manager of Saltz that she had purchased Viyella, he inquired about an advertising allowance from respondent, and learned that she had not received one (Tr. 275-6). He, thereupon, on August 14, 1962, wrote to respondent protesting the situation and requesting an allowance (Tr. 277; CX 18). In the absence of respondent's president, the letter was given an equivocal reply by his secretary on August 20, 1962 (CX 19; Tr. 555, 596).

60. Immediately upon his return the letter from Saltz was brought to the attention of respondent's president, and on the

44

Findings of Fact

same day, August 22, 1962, he wrote to Saltz, stating that there had been a misunderstanding and offering the same allowance Saltz received in 1961 (Tr. 596-7; CX 20). Over the years it had been the policy of Saltz to run the same kind of advertisement, a policy which had been made clear to respondent (Tr. 282-3). Saltz was satisfied with respondent's offer, which actually reimbursed it for half of the cost of its 1962 Viyella advertising, and it had no desire for a larger allowance (Tr. 284).

61. In these circumstances, it is the opinion of the hearing examiner that whether the new buyer for Saltz did not receive an offer of a Viyella allowance in 1962, or did not understand the offer if it was made to her, is of little consequence. The situation was quickly corrected, and Saltz actually received the full allowance in 1962 which it desired to use. It is apparent that what occurred in this instance was the result of human failure, and did not represent a deliberate effort by respondent not to make its advertising program available to Saltz in 1962.

62. Halle Brothers received a Viyella advertising allowance of \$300 in 1961; and \$200 in 1962 (Par. 22 herein). Counsel supporting the complaint contend that this customer was not granted unlimited allowances in 1961 and 1962, but that the amounts of the allowances were fixed by respondent (CSC Proposals, Pars. 34-35).

63. On direct examination the buyer for Halle Brothers testified that the amounts of the allowances received for Viyella advertising in 1961 and 1962 were set by respondent, and that she would have accepted larger allowances if they had been offered (Tr. 397; see also 400-1, 411). On cross examination, however, her memory was highly uncertain, but she testified that Halle Brothers determined the size of the advertisements it would use, that no limitation was placed on the size by respondent (Tr. 400, 402, 412), and that the cost was determined by the size (Tr. 399). She also testified that she indicated to respondent the cost of the advertisements which she proposed to use, and that respondent allowed half of that cost, so that she received the full allowance that she was asking for (Tr. 406-7).

64. In 1961 and 1962 respondent wrote letters to Halle Brothers confirming its agreements for cooperative Viyella advertising allowances in the amounts of \$300 and \$200, respectively (CX 23, 24). The president of respondent testified that before those letters were written he had been advised by the Halle buyer concerning the cost of the advertising she planned to use, and had

Findings of Fact

69 F.T.C.

agreed to allow half of that cost, and that the letters were simply confirmations of these agreements. He also testified that he did not set a limit upon the amount of the allowances, and that he would have allowed half the cost of any advertising Halle Brothers desired to use "because it is Viyella money" (Tr. 497-9. See also Tr. 592-3).

65. It is clear that the record does not establish that respondent limited the amounts of its cooperative Viyella advertising allowances to Halle Brothers in 1961 and 1962. On the contrary, the evidence is persuasively to the effect that the amounts of these allowances were first determined by the customer and then approved by the respondent.

66. Lota Kelly Sportswear, Inc., received a Viyella advertising allowance of \$100 in 1961, and \$75 in 1962 (Par. 22 herein). Counsel supporting the complaint apparently raise no serious question concerning the amount of the allowance received by this customer in 1961, but contend that in 1962 it did not receive as large allowance as requested, and would have accepted a larger allowance if it had been offered (CSC Proposals, Pars. 31-33). They also contend that "respondent appears to have paid for the production costs of the advertisements" of this customer, "not having done so for other customers" (Par. 33).

67. After reaching agreements with its customers concerning advertising allowances, it is customary for respondent to write confirmatory letters to them specifying the amounts agreed upon (Tr. 82-3, 457, 593). It wrote a letter of confirmation to Lota Kelly Sportswear, Inc., in 1961, specifying an allowance of \$100 (CX 25). Not having received such a letter by July 20, 1962, this customer wrote to respondent for the purpose of reminding it that a confirmation of the arrangement was desired (Tr. 458-60; CX 10). On July 25, 1962, respondent wrote the confirmation specifying an allowance of \$75 (CX 11).

68. On direct examination Mr. Bruml, the owner of Lota Kelly Sportswear, Inc., testified that in 1961 respondent offered the Viyella advertising program to him and inquired concerning the cost of the advertising he desired to use. When he stated a figure, respondent agreed to contribute half of that amount. He was not clear on the specifics of his 1962 discussions with respondent, but testified that in general the procedure was the same (Tr. 436-7), but that he received a lower allowance because respondent stated that the Viyella advertising funds available in 1962 had been reduced (Tr. 436-8, 454). He testified that he would have accepted a

larger allowance than he received in 1962 if it had been offered to him (Tr. 440).

69. On cross examination Mr. Bruml testified that the allowance of \$100 which he received in 1961 was all that he wanted or needed from respondent (Tr. 443), and that of that amount he would expect respondent to reimburse him for only half of his actual advertising costs if they amounted to less than \$100 (Tr. 446-7). He did not recall, but testified that it is possible that he actually spent only \$150 in 1961, and received reimbursement of only \$75 (Tr. 447-8. See also 460-1). In 1962 he advised respondent, in substance, that he planned to do approximately what he had done in 1961, but he was thinking in terms of being allowed the same ceiling as in 1961 (Tr. 448-9). It was his opinion that if he had advised respondent that he intended to spend \$400 on Viyella advertising in 1962, he would have been allowed \$200 (Tr. 449-51. See also 455).

70. The president of respondent testified that for business reasons respondent curtailed its purchases of Viyella in 1962, and needed less money for Viyella advertising in 1962 than in 1961. He denied, however, that the advertising money available for Viyella advertising in 1962 was limited or reduced by Hollins, asserting that all that he needed was available, and that the lower amount agreed upon with Hollins was the result of his own estimates and recommendation (Tr. 499-500, 508-13. See, however, CX 19 & 20).

71. The president of respondent also testified that although an allowance of \$100 was authorized for Lota Kelly Sportswear, Inc., in 1961, that customer actually used only about \$75 (Tr. 502-3), and that his conversation with Mr. Bruml concerning his 1962 allowance was based upon that consideration (Tr. 500). It was his recollection that the customer asked for the same allowance which he had received in 1961, and on that basis was allowed \$75 (Tr. 500, 503-4). He testified that if Mr. Bruml had asked for a larger allowance it would have been approved (Tr. 504).

72. The owner of Lota Kelly Sportswear, Inc., testified that he desired an allowance that would cover half of his total advertising costs, including his production costs (Tr. 440), but that it was his understanding with respondent that the allowance would cover half of his newspaper cost of advertising, sometimes referred to as the space cost, and would not include the additional cost of art work (Tr. 453, 460). He estimated that the space costs of the two

Findings of Fact

69 F.T.C.

Viyella advertisements which he used in 1961 amounted to approximately \$70 to \$75 each, a total of approximately \$150 (Tr. 452-3, 460). Although he could not recall precisely (Tr. 447-8), on that basis he apparently presumed that in 1961 the reimbursement which he actually received from respondent amounted to only \$75 (Tr. 460-1).

73. It is clear from the record, therefore, that respondent's advertising allowance to Lota Kelly Sportswear, Inc., in 1962 was half the amount which respondent understood that customer desired to use for Viyella advertising. If it desired, or would have used, a larger amount, it failed to make that situation known to respondent, and only for that reason was limited to \$75. It is equally clear that respondent's contribution to the advertising costs of that customer was based upon its "space costs," as was the situation with other customers, and did not include production costs such as art work.

74. Apparently counsel supporting the complaint do not contend that the record establishes that respondent's cooperative Viyella advertising program was not offered to Virginia Simmons, Inc. They contend, however, that since it is contrary to the policy of this store to mention a manufacturer's name in its advertising, "it would appear that respondent's requirements for Viyella advertising would preclude said customer from participation" (CSC Proposals, Par. 16). They appear to contend on this basis that respondent's program of allowances discriminated against Virginia Simmons, Inc.

75. Although the owner of Virginia Simmons, Inc., testified that it was her best recollection that cooperative Viyella advertising had been offered to her in 1961 and 1962 (Tr. 537-8, 540-3), it is clear from her testimony that she had no specific recollection of such offers, and that, if made, they would have been disregarded and erased from her memory (Tr. 522-9). She was not interested in cooperative Viyella advertising because in such local and limited advertising as she did she was promoting her own name and store, and it was contrary to her policy to mention any other name in her advertising. She ordinarily removed the manufacturers' labels from the garments which she sold, and substituted her own (Tr. 530-1, 538-40). Respondent's saleswoman testified that she explained the Viyella program to this customer in 1961 and 1962 and tried to persuade her to participate, but that the offers were rejected (Tr. 556-60).

76. The record establishes, therefore, that the Viyella advertis-

ing program was offered to Virginia Simmons, Inc., by respondent in 1961 and 1962, and was rejected. Among the reasons for rejection was the requirement that the Viyella name be prominently mentioned in the advertising, which was contrary to the policy of this customer. In these circumstances it is apparent that the policy of this customer would preclude it from participation in any cooperative Viyella advertising program which could be devised by respondent. The law does not require, and would not permit, the granting of advertising allowances to customers who failed or refused to supply the reciprocal service of advertising respondent's products. (See Guide 11 of F.T.C. 1960 Guides for Advertising Allowances, 1 CCH, pp. 6073, 6077).

77. Counsel supporting the complaint contend that advertising allowances were not offered or made available to Dorothy Stead, Inc., in 1962 (CSC Proposals, Par. 11).

78. Respondent's saleswoman testified that in 1961 she offered the Viyella advertising to Miss Stead, and in 1962 to Mrs. Seitz, who was then buyer for Dorothy Stead, Inc., and that in both instances the offers were rejected (Tr. 585-6). Miss Stead did not testify. Mrs. Seitz testified that she did not recall whether or not the Viyella advertising program was offered to her in 1962, but that at that time she was aware of the program because of her prior employment with Lewis & Thomas Saltz (Tr. 131-2), and assumed that she could have participated in the program for Dorothy Stead, Inc., if she had desired to do so (Tr. 131-3, 141-4). There was no need for Dorothy Stead, Inc., to advertise Viyella to the general public, and it did not desire to do so, because it buys Viyella only for special customers, and it is not the type of merchandise with which this store does best (Tr. 144-5).

79. The record establishes that the Viyella advertising program was made available, either affirmatively or through the actual understanding of the buyer, to Dorothy Stead, Inc., both in 1961 and 1962, and that in both years this customer elected not to participate.

80. Counsel supporting the complaint contend that Viyella advertising allowances were not offered to Lelia Noyes Shop in 1961 or 1962, and that no alternatives to newspaper or magazine advertising were discussed in an effort to adapt the program to the specific needs of this customer (CSC Proposals, Pars. 12-15).

81. The then buyer, and the owner of Lelia Noyes Shop both testified. In substance their testimony was that they did not recall whether or not offers of Viyella cooperative advertising were

Findings of Fact

69 F.T.C.

made to them in 1961 and 1962. There would be no point in such offers being made, and, if made, they would have been rejected (Tr. 304, 309-10, 312-13, 319-20, 332, 335-40, 347-9). This customer does some advertising in small local publications, but in doing so does not identify particular manufacturers or fabrics (Tr. 304-8, 311-2, 333-5, 340).

82. Respondent's saleswoman testified that she offered the Viyella advertising program to both the owner and the buyer of Lelia Noyes Shop "in any form that they wanted to use it" in 1961 and 1962, and that her offers were rejected. They did not suggest or request any particular form of advertising (Tr. 560-2).

83. The record establishes that respondent's advertising program was made available to Lelia Noyes Shop in 1961 and 1962, and that this customer was not interested and did not desire to participate. Although there is testimony that the offers were of advertising "in any form," there is no evidence that any particular forms, or alternative forms, of advertising were discussed with representatives of this customer. In view of the certainty of rejection, which apparently was well known to respondent's saleswoman (Tr. 309, 340, 561-2), it is clear that respondent fully discharged its obligation to make its program available to Lelia Noyes Shop.

84. Counsel supporting the complaint contend that respondent did not offer or make available Viyella advertising allowances to Anne Polshek Shop in 1961 or 1962 (CSC Proposals, Par. 27).

85. The owner of Anne Polshek Shop could not recall that she had been offered such allowances (Tr. 415), but they may have been offered to her (Tr. 416, 419, 421). She believed that she would have received an allowance if she had asked for it (Tr. 419), but if the program had been offered to her she would not have accepted it (Tr. 420). The program has been offered to her since 1962, but she has not taken advantage of it because, in her judgment, she doesn't buy enough Viyella garments to warrant advertising (Tr. 419, 421, 423).

86. Respondent's salesman testified that he offered the Viyella advertising allowance to Miss Polshek in 1961 and 1962, and that it was rejected (Tr. 470, 472-4, 477-8). His recollection was based in part upon his practice of offering the allowance to each of his Viyella customers without exception (Tr. 491).

87. There is persuasive evidence that the Viyella advertising program was offered to Anne Polshek Shop in 1961 and 1962, and was rejected. It is clear that the record does not establish that

respondent failed to make the program available to that customer in 1961 or 1962. The record does establish, however, that Anne Polshek did not desire Viyella advertising allowances in 1961 or 1962, and, in any event, would have rejected them.

88. Counsel supporting the complaint contend that Viyella advertising allowances were not offered to Frocks & Bonnets in 1961 or 1962; and that, if offered, this customer would have accepted such allowances for the purpose of window displays and mail enclosures (CSC Proposals, Pars. 28-30).

89. Miss Laura Bergner, the owner of Frocks & Bonnets, testified that she has been offered advertising by different companies, but that she does not accept it (Tr. 374, 386-7). Occasionally she advertises in a small local paper, but such advertising apparently is inconsequential (Tr. 374). The only substantial forms of advertising which she does are window displays and enclosures which she mails to customers with the statements of their accounts (Tr. 374-5). She said that if she had been offered an allowance to pay for window displays or mail enclosures she would have accepted the offer (Tr. 374-5). She also stated that she has never had mail enclosures printed for an advertising program, but that if respondent had offered to share half the cost with her, she may have had Viyella enclosures printed for her use (Tr. 377-8, 394-5).

90. Miss Bergner testified that it is possible respondent's salesman offered her Viyella advertising allowances in 1961 and 1962, but she does not remember his doing so (Tr. 376). She did not tell him that she uses window displays or mail enclosures, and she did not recall any discussion with him concerning such forms of advertising (Tr. 380, 393-4). The substance of a letter which she wrote to respondent for the purposes of this litigation, indicating that respondent's salesman had offered "special benefits for advertising," was, in effect, repudiated during her testimony. That letter is, accordingly, wholly unpersuasive (Tr. 380-91; RX 4).

91. Respondent's salesman testified that in 1961 and 1962 he told Miss Bergner that Viyella advertising money was available, and that he was advised that she did no advertising (Tr. 470, 473, 477). He did not mention any particular form of advertising, neither he nor Miss Bergner made any reference to the possible use of a cooperative advertising allowance for window displays or mail enclosures, and he was not made aware that she uses these forms of advertising (Tr. 471-2, 474, 478).

92. It is apparent, therefore, that except for occasional, inconsequential advertisements in small local papers, Frocks & Bon-

Findings of Fact

69 F.T.C.

nets does no newspaper advertising, and does not accept offers for such advertising. The record does not establish that respondent failed to offer this customer the Viyella cooperative advertising program. It does establish, however, that insofar as the program was offered, it was in general terms, and was rejected, and that no reference was made, either by respondent or by the customer, to the possible use of an allowance to defray the cost of window displays or mail enclosures.

93. There is no evidence that in 1961 and 1962 window displays and mail enclosures constituted a part of the Viyella advertising program regularly and affirmatively offered to its customers by respondent (Par. 46 herein); nor is there any evidence that respondent refused to grant Viyella allowances for such purposes where it had reason to believe that they were desired by its customers. There is no showing that respondent had reason to believe that Frocks & Bonnets desired or would have used such allowances in 1961 or 1962. On the contrary the evidence indicates that it is highly unlikely that this customer would have undertaken the preparation, and paid half the cost, of window display or mail enclosure material for advertising Viyella if allowances for these purposes had been offered by respondent. In these circumstances, it is the opinion of the hearing examiner that the record does not establish that in 1961 or 1962 respondent failed to make Viyella advertising allowances available to Frocks & Bonnets on terms which were proportionally equal with its allowances to competitors of this customer.

94. Counsel supporting the complaint apparently concede that respondent made its Viyella cooperative advertising program available to Milgrim Stores in 1961, and that this customer was not interested in the program in 1962. They contend, however, that respondent did not offer or make the program available to this customer in 1962 (CSC Proposals, Pars. 25-26).

95. The president of Milgrim Stores testified that in 1961 he was offered a Viyella advertising allowance which he did not accept, but that he was unable to recall such an offer in 1962 (Tr. 287-90, 292, 296-8. See also CX 42 and RX 2). If such an offer had been made to him in 1962, he would not have been interested, and would not have accepted it (Tr. 290). He is satisfied that if he had wanted an allowance in 1962, he could have had it (Tr. 292). The president of respondent testified that he offered Viyella advertising allowances to the president of Milgrim Stores in 1961

and 1962, and that in both years the offers were rejected (Tr. 589-90).

96. The record does not establish that respondent failed to offer a Viyella cooperative advertising allowance to Milgrim Stores in 1962, but it does establish that such an offer would have been a useless gesture. There is, however, persuasive evidence that such allowances actually were offered to this customer in 1961 and 1962, and were rejected.

CONCLUSIONS

1. Respondent is engaged in the sale of ladies' dresses in interstate commerce. In the course of such commerce, it grants payments or allowances to customers, engaged in the resale at retail of its dresses containing Viyella or linen, as compensation or in consideration for the advertising of such dresses by its customers.

2. Certain of the customers receiving such allowances compete with each other, and with certain other customers of respondent who do not receive such allowances, in the sale of the advertised dresses of like grade and quality.

3. Respondent is reimbursed by its fabric suppliers for all funds used in granting allowances to its customers for advertising such dresses. Respondent has full responsibility for determining the policy under which such funds are utilized, and for administering their disbursement, providing only that the trade name of the fabric is prominently mentioned in the advertising. The advertising services furnished by respondent's customers are for its benefit, as well as for the benefit of its fabric suppliers, and the respondent is responsible for any disproportionate advertising payments or allowances to its competing customers which may occur.

4. The advertising allowances granted by respondent are equal to one-half of the actual cost to the customer of the advertising, excluding production costs. The allowances are not based upon the customers' volume of purchases, and no limit is placed upon the amount which respondent will contribute. The cost of the advertising is left entirely to each customer, and is limited only by the amount which it is willing to pay as its share. Respondent's plan for granting advertising allowances, accordingly, satisfies the "proportionally equal" requirements of Section 2(d) of the Clayton Act as amended.

5. No written or printed announcements of respondent's cooperative advertising program are sent to its customers, and the

Opinion

69 F.T.C.

program is made known to them only by the oral offers of its sales staff. The staff is instructed to offer the program to every customer who purchases the advertised dresses, and the instructions are consistently followed. The offers are largely in general terms, and there is little suggestion by respondent concerning the various forms of advertising which the customers may use. In 1961 and 1962 allowances were actually made only for newspaper or magazine advertising, but they were not limited by respondent to those forms of advertising. The allowances were available for other forms of advertising at the election and initiative of the customer. The plan is not tailored to favor any particular customer or group of customers, or to exclude others.

6. Respondent's cooperative advertising program is, with rare exceptions, affirmatively offered and made available to all customers competing in the distribution of the advertised dresses, and the program is not deliberately concealed from any customers. Failure, or apparent failure, to make affirmative offers of the program occasionally occurs, either as a result of inadvertence by respondent's sales staff or as a result of misunderstanding by the customer. In some such instances affirmative offers would have been useless gestures, but in all such instances which are brought to respondent's attention, the program is immediately made available.

7. Respondent's cooperative advertising program is "honest in its purpose and fair and reasonable in its application." It is, accordingly, available on proportionally equal terms to all customers competing in the distribution of the advertised dresses. The payments or allowances granted by respondent to its customers as compensation or in consideration for the advertising of its dresses, therefore, do not constitute violations of Subsection (d) of Section 2 of the Clayton Act, as amended.

ORDER

It is ordered, That the complaint herein be, and it hereby is, dismissed.

OPINION OF THE COMMISSION

JANUARY 18, 1966

BY DIXON, *Commissioner:*

The complaint in this matter alleged that respondent House of Lord's, Inc., a manufacturer of wearing apparel, has violated Sec-

tion 2(d) of the amended Clayton Act, 15 U.S.C. 13(d),¹ by granting promotional allowances to certain of its retail customers without making such payments available to competing customers on proportionally equal terms. In an initial decision of February 11, 1965, a Commission hearing examiner concluded that the charge was not supported by the evidence and ordered the complaint dismissed. The matter is now before us on the appeal of counsel supporting the complaint.

I

Certain of the facts are not in dispute. Respondent House of Lord's, Inc., is a New York corporation engaged in the manufacture of ladies' dresses, with sales of approximately \$1,600,000 in 1962. One of its principal products is a "line" of dresses made of an imported wool-and-cotton fabric called "Viyella," a trade name used by its English weaver, William Hollins & Company, of London. Respondent Lord's imports this fabric, designs and manufactures dresses from it, and sells those dresses to some 350 retail department and "specialty" dress stores located throughout the United States. These dresses retail to the consumer at prices ranging generally from about \$25 to \$50.

Until about 10 years ago, the English fabric-maker (Hollins) did its own Viyella advertising in the United States; through its own employees in New York, it placed advertisements in American newspapers and paid the full cost of those ads. At that time, however, the president of respondent House of Lord's, a Mr. Joseph Handelsman,² suggested to his English supplier that Viyella dresses could be more advantageously advertised in the United States by enlisting the aid of their American retailer-customers on a "50-50 cooperative basis"—that is, letting the retailers place the advertisements and bear 50% of the cost. That suggestion was accepted by Hollins. Now, in the fall of each year, Hollins determines the amount of money it desires to spend on the promotion of Viyella in the United States in the coming year. Once this amount has been determined (approximately \$16,000 in

¹ Section 2(d) provides: "That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

² Joseph Handelsman, president of respondent House of Lord's, is the brother of Maxwell Handelsman, counsel in this matter for respondent House of Lord's.

Opinion

69 F.T.C.

1961, \$12,000 in 1962), the English fabric-maker's role in the advertising program is virtually ended; respondent Lord's is authorized to spend the money as it sees fit.

The following example illustrates the mechanics of respondent's program. On July 20, 1962, one of its retail customers in Cleveland, Ohio—Lota Kelly Sportswear—wrote to respondent Lord's: "We are finalizing our September advertising plans, and these include two Lord's Viyella dresses. Your help in the form of cooperative advertising assistance is needed, as in past years. May we hear from you?"³ Lord's replied: "This will confirm agreement, according to which we will contribute \$75.00 towards a cooperative newspaper ad on our Viyella dresses. This ad is to be on a fifty-fifty basis, our share not to exceed the specified sum. To avoid any problems at a later date we ask that you adhere to the following details:

1. Viyella as used in their trade name is to be displayed in the ad.
2. Three copies of the ad to be sent with bill for payment.
3. House of Lords should be mentioned.

If this is satisfactory, please sign the enclosed copy of this letter and return it to me."⁴

On September 29, 1962, Lota Kelly sent respondent Lord's a bill for \$74.39, that sum being 50% of the \$148.68 that customer had paid the Cleveland *Plain Dealer* ("252 lines at .59 per line").⁵

Lord's pays these bills either by sending the customer a check or by deducting the amount from its next invoice to the customer for dresses sold. When all of the year's bills are in from the retailers (together with copies of the ads themselves, as proof that they have actually been published), and all of the retailers' bills have been paid by respondent Lord's, it then forwards these documents to its fabric supplier, Hollins, in London. The latter, in turn, reimburses respondent Lord's for the sums it has paid to the retailers.

II

Respondent does not contend that all of its approximately 850 retail customers actually *received* promotional allowances from it in the years in question here, 1961 and 1962; it does argue, how-

³ CX 10.

⁴ CX 11.

⁵ CX 12.

ever, that all were *offered*⁶ such allowances. Thus it was stipulated, for example, that only 5 of its Cleveland customers and only 4 of its Washington, D.C., customers in fact received any of that promotional money in 1961.⁷ The amounts received by the favored customers in these two representative cities were also stipulated; they ranged from a high of \$2,000 (Peck & Peck, for an ad in the *New Yorker* magazine) to a low of \$100 (Lota Kelly, of Cleveland, and Lewis & Thos. Saltz, of Washington, D.C.). Further, respondent does not challenge the examiner's finding that those 9 favored customers in those two cities are in competition with its other customers there who did *not* receive such payments.⁸

It is respondent's position that the 6 nonfavored customers called by counsel supporting the complaint as witnesses in this proceeding—3 from Cleveland and 3 from Washington, D.C.—were *offered* promotional money on the same terms as their favored competitors, but that each of them rejected it. Respondent called 3 witnesses. Its president, Joseph Handelsman, testified that he personally made the offer to those of his customers that he dealt with himself (including 1 of the nonfavored customers that testified here) and that he carefully instructed his 6 salesmen to make the offer to the others. Respondent's other two witnesses—salesman Samuel Crane, in charge of the Cleveland territory, and saleslady Dorothy Cole, of the Washington, D.C., sales territory—testified that they carried out those instructions and did in fact offer respondent's promotional "program" to each of

⁶ The statute, Section 2(d) of the amended Clayton Act (see n. 1, *supra*), does not use the word "offer"; it requires only that the seller make his promotional allowances "available" to the competing customers. See *Vanity Fair Paper Mills, Inc. v. Federal Trade Commission*, 311 F. 2d 480, 484-485 (2d Cir. 1962). Thus the crucial factor is not the particular formalities by which he acquires it, but the information actually possessed by the customer—particularly his knowledge of the seller's *willingness* to grant him the allowance. *Forster Mfg. Co.*, Dkt. 7207 (July 23, 1965), 8 [68 F.T.C. 191, 197]. No such question is presented here, however; both of the parties have cast their arguments in terms of whether the nonfavored customers were in fact "offered" the allowances in question, respondent Lord's contending only that direct "offers" were actually made and complaint counsel arguing that those customers were never informed of, and in fact knew nothing about, respondent's alleged promotional program. We agree that, in the context of this particular proceeding, the terms "offer" and "availability" are for all practical purposes synonymous, both referring simply to the seller's duty to make sure the competing customers know about the allowances, know of their right to obtain them, and are familiar with the terms (proportionally equal) on which they can be obtained.

⁷ See finding 31.

⁸ For example, one of the nonfavored customers, the owner of the Anne Polshek Shop in Cleveland, testified that "the back of my store faces the back of their [Peck & Peck, a favored customer] store, just about." Tr. 415.

Opinion

69 F.T.C.

their customers, including those called as witnesses in this proceeding. We find this testimony unpersuasive.⁹

With perhaps one exception, the 6 nonfavored customers called by counsel supporting the complaint were reluctant witnesses, anxious to "cooperate" with respondent and thus preserve their "profitable and good relationship" with it.¹⁰ (Prior to their appearance at the hearing, each of them had received a letter from respondent requesting such "co-operation" in the matter.¹¹) Nevertheless, only 1 of the 6 nonfavored customers claimed to have any recollection, at the hearing, of having received such an "offer" in 1962.¹² And that witness, a lady of highly uncertain memory,¹³ was merely "almost certain" about the matter; she "could not say that I was absolutely sure that I was *not* offered it."¹⁴ She was clear, however, that she was "not going to get in-

⁹ See findings 37 through 40. Aside from the denials of the nonfavored customers that they in fact received such offers, there are other circumstances that reflect on the credibility of respondent's three witnesses. For example, Handelsman admitted on the stand that a particularly significant statement in his pre-hearing letter to complaint counsel's prospective witnesses—that he had "records" to prove Lord's had "in fact" offered them the allowances—was wholly false, that respondent had no such records and never had had them. N. 11, *infra*. And he was able to quote verbatim a conversation that the alleged other party to it says never took place. See finding 38, nn. 37, 38, and accompanying text.

Respondent's two salesmen displayed equally convenient memories. Samuel Crane, of the Cleveland territory, purported to recall in his November 1964 testimony the full details of his alleged verbal "offers" to two of the nonfavored customers in a Cleveland hotel showroom in the spring of 1961 and 1962, including what he said to them and what they said in reply. But he was unable even to name any of the other 6 or 7 customers he says were there on the same days, much less recall what he had said to them. Finding 37, nn. 33-34 and accompanying text.

Respondent's saleslady in the Washington, D.C., area, in one particularly revealing incident, was flatly contradicted by no less than 2 witnesses and 3 contemporaneous documents, 2 of which were written by her own employer. Findings 39, 40.

¹⁰ Tr. 340.

¹¹ One of these letters read as follows:

We have been notified by the attorneys for the Federal Trade Commission that they intend to call you as a witness in a proceeding instituted against House of Lords, Inc., for an alleged violation of the Clayton Act, to establish that House of Lords, Inc. did not make available to you for the years of 1961 and 1962 the cooperative advertising program for Viyella dresses which was offered to competing firms in your City.

According to the members of our staff and our records House of Lords, Inc. did in fact make available to you this advertising program for the years in question. It comes as a surprise to us that if you are called, you will so testify.

We would appreciate it very much if you would let us know whether it is true that you are making such a claim and if so, in what manner did we fail to make our advertising program available to you. Please accept our thanks for your courtesy and cooperation. [CX 41 (emphasis added).]

As noted above, Handelsman, respondent's president and the author of this letter, conceded in his testimony that the statement, "[a]ccording to . . . our records House of Lords, Inc. did in fact make available to you this advertising program," was false; there were no such records. Tr. 101, 112, 617-618. See findings 38-35.

¹² Another of these customers, Milgrim Stores of Cleveland, did in fact receive an "offer" from respondent in 1961, but not in 1962. See finding number 38.

¹³ See finding 36, n. 19.

¹⁴ Tr. 524, 540 (emphasis added); finding 36, nn. 18, 19.

volved with any more manufacturers.”¹⁵ The other 5 customers, asked if they had received an offer of promotional allowances from Lord's, gave these answers:

1. Anne Polshek Shop, Cleveland:
Well, not that I recall.¹⁶
2. Frocks & Bonnets, Cleveland:
No.¹⁷
3. Milgrim Stores, Cleveland:
No.¹⁸
4. Dorothy Stead, Inc., Washington, D.C.:
No.¹⁹
5. Lelia Noyes Shop, Washington, D.C.:
I couldn't say I was, and I couldn't say that I was not.²⁰

The most that any of these witnesses could say for respondent is summed up in the following testimony brought out on cross-examination by Lord's counsel:

Q. If I were to tell you that Mrs Cole [respondent's Washington saleslady] did propose to you this advertising program, would you say that it could have happened?

A. I would say it could have happened . . . I think it was likely because we had a profitable and good relationship . . .²¹

This is not enough. As the court said in *Vanity Fair Paper Mills, Inc. v. Federal Trade Commission*, 311 F. 2d 480, 487 (2d Cir. 1962), “a seller who has paid a special promotional allowance to some customers and not to others does not avoid the proscription of § 2(d) merely because payment *might have been* ‘available on proportionally equal terms to all other customers competing in the distribution of such products or commodities’; he avoids it only if such payment ‘is’ available.”²² And it “is” available to a customer, whether on “proportionally equal” terms or otherwise, only if the customer knows about it. “[A] supplier's failure to inform a favored customer's competitors of the ‘availability’ of such promotional allowances is tantamount to

¹⁵ Tr. 541.

¹⁶ Tr. 415.

¹⁷ Tr. 374.

¹⁸ Tr. 287.

¹⁹ Tr. 132.

²⁰ Tr. 348.

²¹ Tr. 388-340 (emphasis added).

²² (Emphasis by the court.) We need not attempt to resolve here the question of whether respondent's burden of proof is the “burden of persuasion” or merely the “burden of going forward.” See §§ 2(b), (d), 15 U.S.C. 18(b), (d); *State Wholesale Grocers v. The Great Atlantic & Pacific Tea Co.* 258 F. 2d 831, 838 (7th Cir. 1958); *Vanity Fair Paper Mills, supra*, at 486. We think it clear from the testimony quoted above and in the accompanying findings that at least 5 of the 6 nonfavored customers called as witnesses here had no information whatsoever about respondent's alleged promotional program prior to the commencement of this proceeding.

Opinion

69 F.T.C.

concealment, and effectively precludes those competitors from participating in them." *Fred Meyer, Inc.*, Dkt. 7492 (March 29, 1963), [63 F.T.C. 1, 37].

III

In the face of this clear proof that respondent has not, in fact, informed all of its eligible customers of its alleged promotional "program," we are particularly unimpressed by the argument that, since the promotional money in question is not its own but that of Hollins, its English supplier, Lord's itself has no *motive* for discriminating among its customers. This argument presupposes that the *amount* of that supplier-money is *unlimited*. And that is not a fact. Each year, prior to the beginning of the selling "season," the executives of Hollins fix the amount of money they wish to spend on the promotion of Viyella dresses in the United States in the coming year.²³ In 1961, it was fixed at \$15,000 to \$16,000; in 1962, it was cut back to \$11,000 or \$12,000.²⁴ If that \$12,000 had been divided equally among the approximately 350 retail customers who buy Viyella dresses from respondent Lord's, it would have amounted to just over \$34 each. To give one customer a larger amount (*e.g.*, \$2,000 to Peck & Peck for an ad in the *New Yorker* magazine) necessarily requires respondent to give a smaller amount (that is, *less* than \$34) to some of its smaller customers.

²³ Tr. 74, 76; 508-510; 603-604. See finding number 40, n. 56. Respondent Lord's "decided how it was to be spent," tr. 76, after the Hollins executives had decided "[h]ow much money was available . . . [W]e determined the policy *once the amount* was given to us. Like Viyella would give us a bulk amount, and we could distribute to the best of our knowledge or to the best of our ability to get the sales and volume." Tr. 603 (emphasis added). This supplier will "go along with" respondent Lord's if it exceeds the budgeted amount by "one thousand or two thousand," but beyond that Hollins would not foot the bill and the money would have to come out of respondent's own pockets. Tr. 75, 510. After all, "they have *their advertising budget*" also. Tr. 75 (emphasis added).

²⁴ Tr. 508-510; finding number 40, n. 56. This cutback by Hollins in 1962 naturally required respondent Lord's to reduce the amounts allowed to the retailers. For example, Lewis & Thos. Saltz, a Washington, D.C., customer who had been receiving the allowance for years, had considerable difficulty getting it in 1962. Respondent explained to Saltz that "our budget was severely curtailed this season and we have had to reduce our ad cooperation." CX 19. And: "Our advertising budget was cut considerably this year and we naturally had to make proportionate cuts in allowances to our customers." CX 20. Another customer (Lota Kelly, Cleveland) who had been receiving the allowance in prior years had to write and *ask* for it in 1962. CX 10. The owner of this establishment testified that "Mr. Handelsman advised me at that time [1962] that since the *appropriation of money made available to Lord's Sportsweat by the Viyella people had been reduced*, that we might not receive as much money as we wanted." Tr. 438 (emphasis added). He would have accepted more money in 1962 if it had been offered: "Yes. We would have run a larger ad or two ads." Tr. 440. (Later, on cross-examination, the witness was led to say that he was satisfied with what he had received. But he subsequently explained his "satisfaction" this way: "We have done business together for many years and I think if there was any feeling on my part that I was asking him for any sum of money that was going to be *difficult for him to give me*, that I probably voluntarily reduced any request that I might have otherwise made." Tr. 455 (emphasis added).)

IV

This same consideration—the understandable desire to “get the longest mileage”²⁵ out of a limited number of promotional dollars—also explains respondent’s “motive” in limiting its promotional payments to those retailers who are large enough to engage in *newspaper and magazine* advertising.²⁶ As respondent’s president explained, newspaper advertising is preferred because “that’s the best medium of results.”²⁷ In other words, respondent Lord’s believed its own interests were best served by allocating the limited number of dollars provided by Hollins to a few large retailers²⁸ and excluding from the program its smaller customers, those who had to use more modest forms of promotion.

But whatever the commercial expediencies of such an exclusionary policy, it is clearly at odds with Section 2(d) of the amended Clayton Act. A seller’s “offer” to pay 50% of a customer’s *newspaper* lineage cost,²⁹ when the customer is “too small” or otherwise unable to engage in any kind of newspaper advertising,³⁰ is in fact and in law not an offer at all. As the court said in *State Wholesale Grocers v. The Great Atlantic & Pacific*

²⁵ Tr. 604.

²⁶ Respondent concedes that all of its 1961 and 1962 payments were *in fact* for advertisements run in those two media. And the record makes it clear that this was the only kind of advertising respondent was willing to pay for. See finding 42. For example, respondent’s Washington saleslady candidly testified as follows:

Q. Supposing that in your dealings with me I stated to you that I do no *newspaper* advertising?

A. Then I go up and I say that, if you are not interested, you don’t advertise. [Tr. 566 (emphasis added).]

²⁷ Tr. 109.

²⁸ There are of course other reasons for a manufacturer to give its larger customers a disproportionately large share of its total advertising money. Powerful buyers often *demand* larger and larger contributions of this type as the price of their continued patronage. And in industries like this one, where “style” is an important factor in the consumer’s purchasing decisions, manufacturers can enhance the “prestige” of their goods and hence their sales by having them sold in the “better” retail establishments, those that already enjoy a reputation in their communities for selling the more fashionable merchandise.

²⁹ Finding number 42.

³⁰ Finding number 41. Each of the 6 nonfavored customers involved here testified that they do engage in some form of advertising, using such media as small “local” newspapers, window displays, “stuffers” (direct mail advertisements “stuffed” in the consumer-customer’s end-of-the-month statement or bills), and so on. *Ibid.* And they did *not* say they would reject a promotional allowance geared to these media; only one of the 6 nonfavored customers was asked about the cooperative use of such non-newspaper promotions (“stuffers”), and she testified that “if the cost wasn’t too great, there is a possibility.” Tr. 394; see findings, n. 58. Nor are we impressed by the “bootstrap” argument that these customers are “too small,” or sell too little of respondent’s merchandise, to be interested in receiving their fair share of its promotional allowances. The very purpose of advertising and other promotional activity is to increase sales; respondent cannot favor one customer over another and then point to the latter’s smaller sales volume as justification for the discrimination. “If these non-favored buyers had received . . . [the discriminatory price concession], they, too, would have doubtless increased the volume of their sales and, in turn, of their purchase from the suppliers.” *Fred Meyer, supra* at 68.

Opinion

69 F.T.C.

Tea Co., 258 F. 2d 831, 839 (7th Cir. 1958): "In determining the proportionally equal terms upon which a seller shall make available any payment or consideration referred to in § 2(d), the Act requires a frank recognition of the business limitations of each buyer. An offer to make a service available to one, the economic status of whose business renders him unable to accept the offer, is tantamount to no offer to him."

V

But even if this alleged "program" had in fact been communicated³¹ to all of its 350 Viyella customers and had imposed no limitations on the promotional media those customers could use, we would still have grave doubts about its lawfulness under the statute. For example, respondent claims that it offers to pay every customer 50% of *any amount* the customer might elect to spend on the promotion of Viyella dresses. But this is not a fact. Handelsman is not only selective in picking those of his 350 Viyella customers who are to receive an allowance in the first place, but also sets an arbitrary *dollar* limit on the amount he will allow even those favored customers.³² For example, one of his favored Cleveland customers, Lota Kelly, asked respondent to pay 50% of its *total* cost of advertising Viyella, including both the newspaper "space" or lineage costs and the "production" costs (art work, etc.). Respondent refused to contribute anything to the latter costs (which amount to about 25% of the total production-plus-space costs).³³ This favored customer also wanted to run, in 1962, either a larger advertisement than the one it had used the preceding

³¹ While the statute prescribes no particular *method* by which the "availability" of promotional allowances are to be communicated to the seller's customers, there is good reason to view with some skepticism those promotional "programs" that are conveyed solely by word-of-mouth from the seller's executives to its salesmen, and then from the salesmen to the customers. A great deal can get lost in these oral transmissions. *Vanity Fair Paper Mills, Inc. v. Federal Trade Commission*, 311 F. 2d 480, 485-486 (2d Cir. 1962). Even if the salesman doesn't "forget" to mention it at all to the smaller customers, subtle variations in the "terms" of such a program—variations that can make it attractive or unattractive, depending on whether the salesman wants the customer to accept or "reject" the "offer"—are far easier to effect if those terms are not reduced to writing and openly distributed. In obvious recognition of this special utility of the "oral" promotional program as a device for discriminating between customers, respondent apparently abandoned it during the course of this proceeding. Tr. 527. We have not been told, however, whether all of its customers are now receiving these new "written" offers, nor the "terms" set forth in them.

³² Respondent is quite diligent in reducing this aspect of its promotional "program" to writing. After telling the customer the maximum amount he can have, respondent writes him a letter: "This will confirm agreement, according to which we will contribute \$75.00 towards a cooperative newspaper ad on our Viyella dresses. This ad is to be on a fifty-fifty basis, our share not to exceed the specified sum [75.00]." CX 11 (emphasis added). The other favored customers received similar letters. CX 17, 21-25, 30.

³³ See finding 42.

year, or an additional advertisement of that same size.³⁴ But respondent refused to share even the lineage or space cost for that second ad: "Mr. Handelsman advised me at that time [1962] that since the appropriation of money made available to Lords Sportswear by the Viyella people had been reduced, that we *might not receive as much money as we wanted.*"³⁵

Other favored customers testified to similar restrictions. A representative of Halle Bros., of Cleveland, testified that Handelsman set a dollar maximum, and that she would definitely have accepted larger contributions if they had been offered: "Well, I had asked him what I would be able to get towards an ad . . . I would like an ad as large, you know, as I would be able to have. So it would depend upon my merchandise or *how much I could get.*"³⁶ A representative of another favored customer, Garfinckel (Washington, D.C.), similarly testified that Handelsman did not allow her all the advertising money she wanted, that he fixed the maximum dollar amount she was to receive, and that *she did not know how he arrived at that maximum figure.*³⁷ In other words, the promotional allowances this respondent gives to even its favored customers are set by its president, Handelsman, in separate negotiations with each individual customer, at arbitrarily-fixed dollar amounts bearing no discernible relationship to any expressed standard of proportionality.

VI

We think respondent's alleged promotional "program" falls short of the statute's requirements in still another particular. As noted above, its offers of promotional payments were in fact limited to a few selected customers, and the offers to even those favored customers were limited to the payment of 50% of their

³⁴ Tr. 440.

³⁵ Tr. 438 (emphasis added).

³⁶ Tr. 397, 405, 411 (emphasis added).

³⁷ Tr. 217-218. For example:

Q. Mrs. Walser, was there a limitation on the amount or was there a maximum amount that House of Lord's would grant Julius Garfinckel for the promotion of Viyella products?

A. Yes.

Q. Who set this maximum amount?

A. Mr. Handelsman.

Q. Could you have all the advertising money that you wanted from House of Lord's?

A. No.

Q. And who set this \$200 figure?

A. Mr. Handelsman.

Q. Mrs. Walser, can you tell me how this \$200 figure was arrived at? Do you know?
A. No.

Opinion

69 F.T.C.

magazine and newspaper lineage cost. Hence there is no factual basis for respondent's claim that it informed all customers of its willingness to pay half of the cost of "any" advertising they might care to undertake. But an "offer" as vague as this, even if actually made, simply does not convey enough information to permit an intelligent evaluation of what is being proposed. For example, one of respondent's salesmen described his "offering" technique this way: "No, no. I did not mention any sort [type or medial of advertising. It was up to them if they wanted to advertise."³⁸ In other words, respondent would leave it to the retailer to devise his own advertising program, with no advice or suggestions from respondent itself. It is true, of course, that a seller may have a promotional "plan" with several alternative features, only one of which may be suitable for, or usable by, a particular customer. *State Wholesale Grocers, supra*, at 838-839.

³⁸ Tr. 472. This vagueness of respondent's alleged oral offers obscures still other questions. For example, respondent claims that it offers to "cooperate up to the amount that they [the customers] decided upon on a 50-50 basis" (tr. 82), i.e., that it will pay 50% of the customer's advertising "costs." What "costs" are included in this alleged offer? This record shows that respondent has in fact limited its payments to magazine and newspaper "space" or "lineage" costs (finding number 42). And that is considerably less than 50% of the retailer's total advertising costs. For example, one favored customer testified that his Viyella ads in the Cleveland *Plain Dealer* cost him a total of about \$95 each, including approximately \$70 to \$75 for the newspaper "space" and another \$25 for "production" costs ("art work and layout"). But respondent limited its contribution to 50% of the "space" cost (half of \$70-\$75, or \$35 to \$37.50), less than 40% of that customer's total advertising costs (\$95). In other words, respondent's arrangement with this customer is not "50-50" but 40-60 (e.g., \$37.50 out of total costs of \$95).

In his cross-examination of witness Bergner, a non-favored Cleveland customer, respondent's counsel put this question: "If you were informed that House of Lord's had no stuffers but that if you wished to engage in any stuffing program you would have to have your own printed and then half the cost would be rebated to you, would you have engaged in such a program?" Tr. 394 (emphasis added). This implies, of course, that respondent would here pay 50% of "production" costs (which it refuses to pay to the customers who use newspaper advertisements), but would not credit, in computing the customer's share of the total costs, any actual "services or facilities" the customer might render or furnish. Yet such things as window space, counter space, customer lists (for direct mail or "stuffer" advertising), and so on have a reasonably determinable market value. (In a recent Commission case, one of the allowances in question was a supplier's payment of \$150 a month for a particularly desirable segment of shelf space in the stores of a supermarket chain. *Fred Meyer, supra*, at 38.) Indeed, to refuse to credit the customer for his "services or facilities" is to evade the principal thrust of the statute; promotional allowances, as this Commission reported to the Congress prior to the passage of the Act, "usually contemplate the performance of specific acts by the recipients thereof, such as the insertion of advertisements in local newspapers and catalogs and in programs of local events, the dressing of windows and counters with the products or signs of the manufacturers, and the display of products on show cases." Final Report on the Chain-Store Investigation, Sen. Doc. No. 4, at 60 (74th Cong., 1st. Sess., December 14, 1934) (emphasis added). If Customer A is merely required to furnish money (buy space in a newspaper), competing Customer B obviously cannot be required to furnish proportionally the same amount of money and supply respondent with free facilities (such as mailing lists) and services (mailing its stuffers). Such "terms" would not be "proportionally equal"; the fair market value of the Customer B's services and facilities must be credited in computing its share of the total cost of promoting respondent's product, whether that share be 50%, 60%, or any other figure respondent might reasonably require.

"However, such a seller may not take it upon himself to decide which of the several features of his promotional plan is to be offered to a particular customer; that choice is to be made by the customer himself, *after the seller has presented him with the terms of all of the 'available' alternatives.*" *Fred Meyer, supra*, at 61 (emphasis added). In that case, the Commission expressly rejected a construction of the statute "that would permit a seller with a promotional plan having, say, ten different features, to select Feature 1 for Buyer A, Feature 2 for Buyer B, and so on, concealing from each the nature of the activity for which the others were being paid." *Ibid.*

The necessity for such a rule is well illustrated here. To the witnesses in this proceeding, as noted, the word "advertising" has a special, highly restrictive meaning; it refers to "newspaper advertising" only, not to the myriad other forms of merchandise promotion. As a result of this restrictive definition placed on that term, an offer of "advertising" money—with no further explanation—is interpreted by these retailers as an offer to share the "lineage" cost of running an advertisement in a newspaper, nothing more. As one witness explained it: "Lots of manufacturers do not accept that [advertisements in a local paper called *Heights*] as even advertising. They want you to advertise in the morning Plain Dealer before they even call it advertising, and we have never done that."³⁹ Thus in the context of this industry, an offer to share the "advertising" costs of a small retailer, one who can't afford newspaper advertising, is, as the court said in *Wholesale Grocers, supra*, no offer at all. When this respondent elects to give promotional money to one of its customers in a community, it has the duty, we believe, to devise and communicate to each of its other competing customers in that community a promotional plan with at least one feature that can be used by each of them. Any promotional program that falls short of this minimum standard of fairness is surely at odds with the statutory standard of proportional equality.

VII

Only one aspect of the order to be entered here requires special comment. The statute, as previously noted, prescribes no particular means or methods by which sellers are to make known to their competing customers the "availability" of their promotional allowances. And though a written notification would appear to be

³⁹ Tr. 374; finding number 41, n. 57. See also finding number 42, n. 72.

Dissenting Opinion

69 F.T.C.

far and away the most—and perhaps even the only—completely reliable method of performing this duty, it is of course theoretically possible for a promotional program to be administered orally on a fair and honest basis. Here, however, we don't have a theoretical situation. Respondent's president, before these hearings began, wrote the prospective witnesses that he had "records" to prove they had "in fact" been offered the allowances in question; later, under oath, he admitted that statement had been false, that he had no such records. He testified further that he had told his salesmen "to go full force to all customers who buy Viyella and offer it to them."⁴⁰ And two of his salesmen testified that they had carried out those instructions. In fact, however, they made no such offers. Being constrained to reject the testimony of respondent's president and its salesmen under oath, we think it would be anomalous to again place in their hands the responsibility of *orally* conveying to its customers the information to which we think those customers are entitled. Our order, therefore, will require respondent Lord's to notify its customers of its promotional program in writing. Whatever may be the general requirements of the statute in this regard, it is clear that "an order may permissibly require one who has violated the law to conform to a somewhat higher standard of future conduct than one who has stayed within it." *Vanity Fair, supra*, at 488. We know of no other way to assure this respondent's compliance with even a minimum, much less a higher, standard of law observance.

An appropriate order will be entered.

Commissioners Reilly and Jones concurred and have filed a separate concurring statement.

Commissioner Elman dissented and has filed a dissenting opinion.

DISSENTING OPINION

JANUARY 18, 1966

BY ELMAN, Commissioner:

In several important respects the Commission's decision in this case seems to me most regrettable.

⁴⁰ Tr. 594.

I

As I have noted elsewhere,¹ the stresses and strains on administrative adjudication are especially acute when the result in a particular case may have a bearing upon a general policy or program to which the agency is committed. Unlike judges, who sit as neutral and detached adjudicators, agency members who are responsible for deciding the particular case are also responsible for advancing the goals and effectuating the policies of the statutes which the agency administers. Its success or failure is measured by the general results, or lack of them, which the agency achieves in carrying out its statutory mission. Unlike a judge, an agency member cannot overlook the effect which a decision in a particular proceeding may have on related proceedings before the agency. The fusion of functions within the administrative process affords great benefits in flexibility of action; but it also gives rise to dangers which agency members must acknowledge, and resist as best they can.

The independence of hearing examiners, specifically their isolation from the investigative and complaint-issuance process, is a substantial safeguard against unfairness in administrative adjudication. Particularly where the case is part of a general enforcement program to which substantial agency resources have been committed, an agency should be most reluctant to overrule an examiner's findings on strictly evidentiary questions. Where resolution of an issue of fact does not call for application of agency "expertise," but depends only on the naked question of the credibility of testimony, the hearing examiner's finding should be accorded great respect. In dealing with the question whether or not the testimony of certain witnesses is to be believed, it is an elementary rule that a judicial officer who has actually heard the testimony and observed the demeanor of the witnesses on the stand is in a better position to evaluate their testimony than one who has merely read the cold record. This general rule deserves special emphasis when the reviewing tribunal not only is in no better position to decide the issue of credibility, but is itself open to a charge of being less impartial and having a stake in the outcome of the case.

The relevance of the foregoing observations derives from the background of this case. This proceeding grew out of a publicly-announced broad program by the Commission to enforce Section

¹ A note on Administrative Adjudication, 74 Yale L.J. 652 (1965); cf. *Gimbel Bros., F.T.C.* Docket 7888 (Feb. 23, 1962) (dissenting opinion) [60 F.T.C. 359, 375].

Dissenting Opinion

69 F.T.C.

2(d) of the Clayton Act in the wearing apparel industry. Four years ago, the Commission conducted an investigation which revealed that the practice of suppliers in granting discriminatory and illegal advertising allowances to their customers was rife in the wearing apparel industry. On October 17, 1962, the Commission held a public hearing, at which representatives of the industry appeared, to help decide how best to cope with the enormous practical problems of law enforcement posed by an industry where hundreds, and perhaps thousands, of firms were apparently violating the law. Over the objection of Commissioner Higginbotham and me, the Commission determined to follow its traditional case-by-case approach of issuing individual complaints, in the hope that the law violators in the industry would accept consent orders. Over a period of almost three years, about 300 complaints against wearing apparel manufacturers were issued. The Commission engaged in the most assiduous solicitation of consent settlements by suppliers to whom complaints were sent, with the extraordinary result that all except a bare handful signed agreements. It was made clear that respondents who did not consent would be proceeded against promptly and vigorously. The respondent in this case is one of the very few who did not sign a consent agreement, and chose instead to litigate.

II

The disputed issue of fact which the hearing examiner resolved in favor of respondent is quite simple: Did the respondent make known to all of its customers that it had funds available for cooperative advertising? Because respondent did not communicate its advertising program in writing to any of its customers, but relied on its salesmen to inform them of the program, resolution of this question must depend entirely on the oral testimony adduced at the hearing. The hearing examiner found that respondent did in fact tell all its customers that cooperative advertising funds were available. The majority of the Commission overturns this finding and, on the basis of its own evaluation of the testimony, finds instead that respondent's salesmen did not tell all of their customers about the availability of the advertising allowances.

The question boils down to one of credibility of witnesses. Was Joseph Handelsman, respondent's president, telling the truth when he testified that he had given his salesmen instructions to tell all their customers about respondent's advertising program? Were respondent's salesmen telling the truth when they testified that they told every customer with whom they dealt that coopera-

tive advertising funds were available? Were respondent's so-called non-favored customers telling the truth when they testified that respondent may well have told them about its advertising program, but that they did not remember, and that, in any case, they would not have participated? The hearing examiner, after hearing their testimony, decided that all these witnesses were telling the truth. The majority of the Commission, after looking at the record, has decided that they were not.

Section 8(a) of the Administrative Procedure Act (5 U.S.C. § 1007(a)) provides that "whenever the agency makes the initial decision without having presided at the reception of the evidence, . . . [the officer who presided at the reception of evidence] shall first recommend a decision . . .".² One of the prime purposes of the Administrative Procedure Act was to raise the status of hearing examiners, making their function similar to that of a trial judge.³ Of course, the agency was to remain responsible for formulating policy and deciding questions of law, but the examiner was to decide such purely factual, non-policy issues as that of credibility of witnesses. The House Committee Report on the Administrative Procedure Act states:

The provision that on agency review of initial examiners' decisions it has all the powers it would have had in making the initial decision itself does not mean that initial examiners' decisions or recommended decisions are without effect. They become a part of the record and are of consequence, for example, to the extent that material facts in any case depend on the determination of credibility of witnesses as shown by their demeanor or conduct at the hearing. In a broad sense the agencies' reviewing powers are to be compared with that of courts under section 10(e) of the bill.⁴

Any doubts as to the weight to be given an examiner's report

² See also Section 5(c) (5 U.S.C. § 1004(c)), "The same officers who preside at the reception of evidence . . . shall make the recommended decision or initial decision. . . ."

³ In the report of the Attorney General's Committee on Administrative Procedure (1941), which recommended enactment of an Administrative Procedure Act, it was noted: "In most of the agencies the person who presides [at hearings] is an advisor with no real power to decide. * * * [H]e may have limited powers to rule at the hearings; interlocutory appeals may be taken from his rulings to the agency itself; and his intermediate report may be purely advisory, weighing little in the minds of those who finally decide. Such is his role at the . . . Federal Trade Commission." *Administrative Procedure in Government Agencies*, Sen. Doc. No. 8, 77 Cong., 1st Sess. 44-45 (1941).

"A major purpose of the Committee's recommendations is to increase, in most agencies, the effect of the hearing officer's work in the decision of the case. . . ." *Id.* at 51.

⁴ H. Rep. No. 1980, 79th Cong., 2d Sess. 38 (1946). Virtually identical language is contained in S. Rep. No. 752, 79th Cong., 1st Sess. 24 (1945).

See also: *Administrative Procedure in Government Agencies*, Sen. Doc. No. 8, 77th Cong., 1st Sess. 51 (1941):

"In general, the relationship upon appeal between the hearing commissioner and the agency ought to a considerable extent to be that of trial court to appellate court. Conclusions, interpretations, law, and policy should, of course, be open to full review. On the other hand, on matters which the hearing commissioner, having heard the evidence and seen the witnesses, is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown."

Dissenting Opinion

69 F.T.C.

under the APA were settled in *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474. In an opinion by Mr. Justice Frankfurter, the Court stated that because of the examiner's "opportunity to observe the witnesses," his report "intrinsically commands" considerable "probative force" (at 495), and that when an examiner's report has been reversed by an agency, that report should be given even greater weight by a reviewing court. "[E]vidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion." (At 496.)

The majority of the Commission apparently feels that it is better able than the hearing examiner to determine the question of credibility. It apparently assumes that the examiner's judgment on this issue of fact is entitled to no more weight than his conclusions on law or policy questions. The paragraph of the Commission's opinion dealing with the question of the credibility of respondent's witnesses concludes simply: "We find this testimony unpersuasive." (P. 76.)

Nowhere does the Commission explain why it doubts the ability of the hearing examiner to assess the truth or falsity of the witnesses' testimony. Cf. *Retail Store Employees Union v. N.L.R.B.*, 360 F. 2d 494 (D.C. Cir., July 13, 1965). Does the majority of the Commission believe that the hearing examiner (who, incidentally, prior to becoming an examiner, had many years' experience in such cases as a member of the Commission's trial staff) was a poor judge of credibility?

There are several additional observations to be made on the way the Commission has exercised its fact-finding function in this case:

(1) The Commission has made a finding of fact adverse to respondent on an uncontested issue—one which complaint counsel had conceded. The Commission has determined as a fact that not only did respondent fail to offer its promotional program to all its customers but also that "respondent's salesmen are not allowed to offer promotional allowances to customers; only Handelsman [respondent's president] himself has the authority to make such an offer." (Finding 38.) The issue of the salesmen's authority to offer allowances was not contested below; respondent's testimony on this point was not challenged, and complaint counsel conceded

the point in his brief.⁵ Furthermore, although the Commission copiously documents this finding (Finding 40),⁶ it ignores the unchallenged testimony of the buyer for Best and Company—who testified that she dealt with respondent's salesmen and had been offered an allowance. (Tr. 177-78.)

(2) The Commission has gone to great pains to establish a "motive" on the part of respondent to discriminate among its customers. Since respondent's plan did not base payments on the amount of a customer's purchases, the Commission reasons that respondent would have exceeded its budget had it offered the plan to all customers (Commission opinion, pp. 78-79).⁷

This reasoning ignores the fact that respondent paid only half of a customer's advertising cost. Since the customer paid the other half, the amount of his advertising would necessarily be limited by his volume of purchases.⁸ Clearly, a customer who bought \$400 worth of Viyella dresses would not spend \$400 of his own money in advertising them.⁹ Thus, as long as its advertising budget bore a reasonable relationship to the dollar value of Viyella dresses sold, respondent would have no motive for discrimination. Since the record does not disclose respondent's annual sales of Viyella dresses (hearing examiner's finding 5), we cannot

⁵ Brief for complaint counsel, pp. 6-7, 17.

"The inference is strong, and tenable, that Crane's [one of respondent's salesmen] vague testimony as to his 'offer', in token compliance with company instructions, was dictated by the presence of Mr. Handelsman in the hearing room (Tr. 491), together with the same possible fear of dismissal for failure to carry out instructions, evinced by another salesperson. . . ." *Id.* at 17.

⁶ Among the Commission's reasons for finding that respondent's salesmen lacked authority to offer allowances was that all discussion and correspondence concerning the specific terms of a customer's advertising was done by respondent's president. (Finding 40, text accompanying n. 58, n. 55.) However, the fact that customers discussed their specific advertising plans with respondent's president is not inconsistent with the fact that respondent's sales personnel initially offered them the allowance. One of respondent's saleswomen testified that she would tell customers of the advertising program, but that the customer would work out the details with respondent's president. "I mentioned to all the customers that there are advertising moneys . . . [but] any discussion of financing or anything of that type is taken up with Mr. Handelsman." (Tr. 580.) See also Tr. 552-53, 565-66. The Commission does not cite this testimony.

⁷ The Commission states that respondent was given a fixed advertising budget (Commission opinion, p. 78), but the record discloses that respondent was given "latitude for exceeding that amount by a reasonable sum." (Hearing examiner's finding 38.)

⁸ The hearing examiner pointed this out in his findings:
"[I]t seems reasonable to expect that the fact that the customer must expend an equal amount of its own funds will constitute an effective brake upon the cost of the cooperative advertising which it will undertake, and will keep such cost in reasonable relationship to its volume of purchases of the advertised product." (Hearing examiner's finding 42.)

⁹ The buyer from Julius Garfinkel testified that she had placed an ad costing \$400, and respondent had reimbursed her \$200. She was then asked: "[I]f you had announced . . . that the ad you planned to run . . . was going to cost \$800, do you have any doubt in your mind that you would have gotten a \$400 allowance?" She answered: "I really don't know, because to start with, I would not be spending the \$400." (Tr. 241.)

Dissenting Opinion

69 F.T.C.

determine whether the relationship was reasonable. No one has claimed that it was not.

(3) The Commission states that any promotional program "conveyed solely by word-of-mouth" should be viewed "with some skepticism" (Commission opinion, p. 80, n. 31). Is this why respondent's promotional program has been found to be in violation of Section 2(d)? Failure to inform customers may be a legitimate ground for finding a violation (*cf. Fred Meyer, Inc.*, F.T.C. Docket 7492 (decided March 29, 1963), pp. 15-16) [63 F.T.C. 1, 36-37], but does failure to commit a program to writing compel such a finding?¹⁰

(4) In the letter to respondent urging acceptance of the consent agreement, the Commission implied that the non-cooperative members of the industry would not be "accommodated" to the same extent as those who accepted consent orders.¹¹ This may explain why respondent is the only member of the industry who has been ordered to offer its promotional plan in writing (Commission opinion, pp. 83-84), and the only one who has been ordered to offer specific alternatives to its smaller customers.

III

Also involved in this case is the proper standard for judging the legality of promotional payments under Section 2(d) of the Clayton Act. The majority of the Commission concludes that even if respondent communicated the terms of this plan to all its customers, it violated Section 2(d) because it did so only in general terms and did not specifically offer alternative promotional methods to customers who could not advertise in newspapers or magazines (Commission opinion, pp. 79-80).

¹⁰ Cf. *FTC Guides for Advertising Allowances and Other Merchandising Payments and Services* (1960). "[A promotional] plan need not be written" (p. 3); "The seller should take some action to inform all his customers . . . that the plan is available. He can do this by any means he chooses, including . . . salesman." (P. 40.)

¹¹ A proposed consent agreement was sent to every wearing apparel manufacturer, including respondent, who the Commission "had reason to believe" was violating the Act. The covering letter stated in part:

"The same complaint, order and proposed consent agreement are being forwarded to other manufacturers . . .

"As an accommodation to the parties, the Commission has directed that the complaint and order to be utilized in the consent settlement procedure be only in skeleton form and in very general terms. . . . [I]n this way, each of the wearing apparel manufacturers is spared the embarrassment of having the details of its business relationship with its customers publicized through disclosures made in a long and detailed complaint and in the detailed provisions of a cease-and-desist order applicable to the particular situation.

". . . [I]f any firm involved here should decide not to utilize the consent settlement procedure under the short form complaint and cease-and-desist order now being provided, it is possible that in such cases the Commission will find it necessary to direct the issuance of a complaint and proposed cease-and-desist order in greater detail and more specific terms to serve as a basis for litigation."

The Commission's view of the law converts cooperative advertising from a simple business transaction, by which a seller and buyer share the cost of advertising to their mutual benefit, into a complex endeavor fraught with legal pitfalls. Under its view, a seller who decides to engage in cooperative advertising assumes a heavy burden. He must disregard his own promotional needs and set up an intricate "promotional program" designed to satisfy the desires of all his customers. He may be compelled to pay for "promotional activity" which is of no benefit to him whatsoever, and which indeed is wasteful as well as not beneficial; and he runs the risk of violating the law if he fails to embody all the specific terms of his plan in a written document which he can prove he has circulated among all his customers.

I do not believe that Section 2(d) was intended to have this result. As I read the Act, it provides that a seller may choose those promotional and advertising services for which he will compensate his customers; if he gives a payment to one customer who renders such services, he must give proportionally equivalent payments to all other customers who are ready, able, and willing to provide him with the same services. But the Act does not require him to pay for "services" he does not want or need, and do not help sell his goods.

Before the Robinson-Patman Act was enacted in 1936, sellers had developed several ways of favoring large buyers to whom they could not legally give price concessions.¹² One method was to pay for the large buyer's advertising expenses.¹³ This was not illegal under the Clayton Act, although it had the same effect as illegal price discrimination. The large and small buyers would both pay the same price for goods, but the small buyer would have the added expense of advertising his goods, while the large

¹² A Federal Trade Commission investigation revealed that chain stores often received "preferential treatment" from their suppliers. "Preferential treatment" was defined as "treatment granted to chain stores but not given to other retail dealers, which results in a lower net cost to chainstore customers than to other retailers." Final Report on the Chain Store Investigation, Sen. Doc. No. 4, 74th Cong. 1st Sess. 59 (1935).

¹³ "[P]romotional allowances represent a considerable proportion of all preferences given. Many manufacturers in widely separated areas explained that such allowances were granted only when purchasers were sufficiently powerful to demand them." Final Report on the Chain Store Investigation, Sen. Doc. No. 4, 74th Cong., 1st Sess. 61 (1935).

"One practice which has been indulged in to evade the provisions of the Clayton Act is for the seller to make certain service allowances to the purchaser. They may be called advertising allowances. When the purchaser had great purchasing power he could demand that great concessions be made to him; but here was the Clayton Act, which said, 'You cannot make discriminations in prices.' So there was devised a second scheme under which the seller said, 'We will make you an advertising allowance or a service allowance which will bring about a discrimination in prices.'" 80 Cong. Rec. 6282 (1936) (remarks of Senator Logan, floor manager of the Robinson bill).

Dissenting Opinion

69 F.T.C.

buyer's advertising expenses were paid by the seller. Section 2(d) was enacted to close this loophole.

It was designed to play an important but limited role in the scheme of the Act. It did not purport to prohibit or regulate cooperative advertising.¹⁴ Its purpose was to prevent sellers from giving in to the demands of large buyers and paying advertising allowances only to them. Congress felt that it could achieve this end by requiring sellers to offer "proportionally equal" payments to all customers who could perform the same valuable promotional services.

The standard of "proportional equality" was intentionally left vague. Realizing that it would be impossible to determine precisely the relative value of different customers' advertising,¹⁵ Congress did not prescribe a rigid test for determining the legality of promotional allowances. If a promotional program was "honest in its purpose and fair and reasonable in its application," it would satisfy the "proportionally equal" test. *Lever Bros. Co.*, 50 F.T.C. 494, 512.

As stated by the Senate Committee report:

The phrase proportionally equal terms" . . . is designed to prevent the limitation of such allowances to single customers on the ground that they alone can furnish the services or facilities in the quantity specified. Where a competitor can furnish them in less quantity, *but of the same relative value*, he seems entitled, and this clause is designed to accord him, the right to a similar allowance commensurate with those facilities. S. Rep. No. 1502, 74th Cong., 2d Sess. 8 (1936) (emphasis added). (Virtually identical language is contained in H.R. Rep. No. 2287, 74th Cong., 2d Sess. 16 (1936).)

Thus, what Congress intended to outlaw was the arbitrary selection of customers to receive payments (*Vanity Fair Paper Mills, Inc. v. F.T.C.*, 311 F. 2d 480 (2nd Cir. 1962), cert. denied, 372 U.S. 910); the restriction of payments to large volume purchasers (*Shreveport Macaroni Mfg. Co. v. F.T.C.*, 321 F. 2d 404 (5th Cir. 1963), cert. denied, 375 U.S. 971); the restriction of

¹⁴ "The Robinson bill does not say that an allowance may not be made for advertising services. Legitimate allowances for advertising and matters of that nature may be made, but allowances must not be made for the purpose of giving the purchaser an opportunity to buy goods at a lower price than others similarly situated may buy them." 80 Cong. Rec. 6282 (1936) (remarks of Senator Logan).

¹⁵ The following colloquy illustrates this point:

Mr. Bloom: "[I]f you have a window at Fourteenth and F Streets where thousands of people pass by every day, are you going to pay the same price for one down at Fourth and B Streets where only 50 people pass in the course of a day? * * * There are no two windows alike, no two counters alike. One side of the street is different from the other side. * * * How can you do it on proportionately equal terms when there are no two places alike? Suppose one store is 25 feet and the other store is only 10 feet; what are you going to do with the 10-foot fellow? Give him half a sign?"

Mr. McLaughlin: "You can give him a smaller sign. You do not have to cut the sign in two . . . They have all different kinds of signs now." 80 Cong. Rec. 8286-37 (1936).

payments to certain classes of customers (*Simplicity Pattern v. F.T.C.*, 360 U.S. 55); and the tailoring of promotional plans to suit the needs of large customers (*Elizabeth Arden, Inc.*, 39 F.T.C. 288, *aff'd*, 156 F. 2d 132 (2d Cir. 1946), *cert. denied*, 331 U.S. 806).

But Congress did not require a seller to subsidize all customer "promotional activity," regardless of its value to him.¹⁶ Congress was aware that not all advertising would be of equal value to the seller, and Section 2(d) did not require him to pay for all advertising.¹⁷ He need only pay for advertising which benefitted his business, and his payments had to be in proportion to the benefit he received. Cf. Edwards, *The Price Discrimination Law* 159 (1959) :

[A] payment for useless service, or a payment substantially in excess of the value of the service rendered, is, in effect, a concealed price concession; hence any standard of proportionality other than that of the value of advertising may readily be thought to foster discrimination. Overpayment closely resembles payment for service not actually rendered, which has long been condemned.

To be sure, one can extract from the debates in Congress statements that payments must be made in proportion to a customer's purchases, but these were based on the assumption that all customers could provide services of equal value.¹⁸ A full reading of the legislative history shows that a seller's duty was intended to extend only to those customers who could provide advertising valuable to him. An example given during the hearings clearly illustrates the scope of Section 2(d) :

If a tobacco manufacturer offered an advertising allowance of \$2 per window for the display in each retail-store window . . . , it could scarcely expect to be sustained in offering that allowance only to retail organizations possessing 15,000 retail outlets. The display of that label has comparably the same advertising value when displayed in any retail store handling the products of that manufacturer, whether owned by a concern which has 15,000 other stores

¹⁶ The "purpose [of Section 2(d)] was] to prevent service allowances when the use of them results in *unfair discrimination*." 80 Cong. Rec. 3116 (1936) (remarks of Senator Logan, emphasis added). A discrimination based on a customer's inability to provide a valuable service to the seller would certainly not be an unfair one.

¹⁷ "[P]roportionally equal" is another question of fact to be determined upon all the circumstances in each particular case. It would depend upon such factors as the nature of the service or facilities for which it is offered and the ability of the competitor to furnish such services [sic] or facilities with corresponding value in proportion to the smaller quantities which he might be able to furnish them." Hearings before the House Committee on the Judiciary on Bills to Amend the Clayton Act, 74th Cong., 1st. Sess. 38 (1935).

¹⁸ E.g., "But if the seller grants an advertising allowance to one customer there is no reason why he should not grant, *under identical circumstances*, the same allowance to another customer based upon the quantity of the purchases. If one man buys \$100,000 in goods and should be allowed \$1,000 for advertising purposes, and another buys \$10,000 in goods, he ought to be allowed \$100 for advertising." 80 Cong. Rec. 3116 (1936) (remarks of Senator Logan, emphasis added).

Dissenting Opinion

69 F.T.C.

or 1,500 other stores or no other stores; and it should be entitled to a pro rata allowance accordingly. Hearings Before the House Committee on the Judiciary on Bills to Amend the Clayton Act, 74th Cong., 1st Sess. 38 (1935).

In fact, there is some indication that an even lesser duty was intended to be imposed. All of the examples cited during the hearings and debates assumed that sellers would offer allowances only for specific services.¹⁹ So long as the compensable services were chosen with a view to the seller's promotional needs (and not as a means of favoring a powerful customer), the fact that not all customers could perform the services was irrelevant. If the seller offered payments to all customers who could perform the desired services, he would meet the proportionally equal test. Nowhere in the legislative history was it suggested that a seller would have to pay for other services which would be valueless in selling the products and hence utterly wasteful.²⁰

The Commission, although it has never stated so explicitly, apparently views promotional allowances not as compensation for valuable services actually rendered but as a kind of unjustified price rebate. On such a theory, it would be logical to require that all customers be offered allowances in proportion to the dollar amount of their purchases. The courts, however, have not accepted so rigid or absolute a standard,²¹ so the Commission, although it apparently prefers promotional payments to be made in strict proportion to a customer's purchases,²² does not require it. But it does require a seller to offer promotional allowances to all

¹⁹ E.g., S. Rep. No. 1502, 74th Cong., 2d Sess. 8 (1936) and H.R. Rep. No. 2287, 74th Cong., 2d Sess. 16 (1936):

"Where . . . a manufacturer grants to a particular chain distributor an advertising allowance of a stated amount per month per store in which the former's goods are sold, a competing customer with a smaller number of stores, but equally able to furnish the same service per store, and under conditions of the same value to the seller, would be entitled to a similar allowance on that basis."

See also note 15, *supra*.

²⁰ Cf. Hearings Before the Committee on the Judiciary on Bills to Amend the Clayton Act, 74th Cong., 1st Sess. 38 (1935):

"[If allowances are offered to one customer] they must be offered on proportionally equal terms to all other customers, but naturally, if such offer is not accepted, the manufacturer's responsibility ends. Naturally also such offer can be accepted only by those customers able to furnish the services or facilities for which they are offered. (Emphasis added.)

²¹ Cf. *Vanity Fair Paper Mills, Inc. v. F.T.C.*, 311 F. 2d 480, 486 (2d Cir. 1962), cert. denied, 372 U.S. 910; *Atlanta Trading Corp. v. F.T.C.*, 258 F. 2d 365, 371 (2d Cir. 1958). Nor has the Commission always applied this standard. In *Lever Bros. Co.*, 50 F.T.C. 494, the Commission held that proportional equality was achieved when respondent offered higher promotional allowances for newspaper advertising than it did for radio or handbill advertising. "[A]dvertising by newspaper is more expensive and more effective than advertising by either handbill or store display. Evidently respondents considered it of more value to them and their payments are made on that basis." (At 511-12.)

²² Cf. *FTC Guides for Advertising Allowances and Other Merchandising Payments and Services* (1960).

competing customers—even to those whose “services” are valueless and wasteful. Since it views allowances as price rebates, the Commission refuses to consider the benefit, or lack of it, the seller derives from such payments.²³ In fact, a seller who attempts to use promotional allowances to increase sales of his product is, in the Commission's eyes, tainted with an illegal motive (Commission opinion, p. 79). What the Commission fails to realize is that its interpretation of “proportionally equal” puts Section 2(d) in conflict with the rest of the Act. Requiring that all customers be given promotional allowances when only some provide valuable services is like saying that all customers must receive price discounts when only some provide the seller with a cost justification. It also means that the Commission applies Section 2(d) so as to compel sellers to subsidize “advertising” and “promotional” activities by customers which are useless, unnecessary, and benefit nobody.²⁴

In addition to its misinterpretation of the proportionally equal requirement, the Commission imposes an impossible burden for meeting the requirement of “availability.” In this case, for the first time, the Commission holds that it is not enough for a seller to make a general offer of cooperative advertising funds. To comply with the law, he must explain to each customer, with great specificity and in writing, all the various promotional services which may be performed. This part of the Commission's opinion is entirely without precedent. In most cases the issue has been “was the allowance available to customers who wanted it,” or

²³ See Edwards, *The Price Discrimination Law* 156-64 (1959), for a discussion of the various interpretations of “proportionally equal.”

“Customers might be said to be equally treated by either of two standards: (a) if the services and payments for service that they receive are proportional to the purchases they make from the seller; or, (b) if these services and payments are proportional to their value, that is, to the effect in promoting the seller's business that they can achieve.” *Id.* at 156.

“The choice between [these two standards] . . . is . . . a difficult one. An advertising allowance may be conceived as a concealed discount. If so, its primary effect is to alter the net price at which goods are bought, and in a price-discrimination statute this effect should . . . be sterilized through some such requirement as a proportional relation between the amount of the allowance and the amount sold. . . . However, an advertising allowance may also be conceived as a price paid for a legitimate advertising service. In this view, the purchase of advertising is similar to a purchase of transportation or of raw materials. Some purchasers may be unable to provide the kind of advertising service desired; others may be able to provide only service of inferior quality.” *Id.* at 158.

²⁴ Discussing the Commission's interpretation of proportionally equal, the former Chief Economist of the Commission said:

“[I]t is inappropriate to require a buyer of advertising service to buy it from all his customers if he buys it from any and to buy it from them in stated proportions to which proportionate values are arbitrarily assigned. One might, with similar logic, require a steel manufacturer to buy railway transportation service from every railroad in proportion, not to his need for service from each, but to the amount of his steel products purchased by each.” Edwards, *The Price Discrimination Law* 159 (1959).

Dissenting Opinion

69 F.T.C.

"did the seller take steps to conceal it."²⁵ Never before has the Commission held that a seller must not only offer an allowance, but that he must also offer it in specific terms geared to each particular customer's desires. In the *Vanity Fair Paper Mills* case, *supra* note 21, the court traced the Commission's varying interpretations of the "availability" requirement.

A promotional allowance is not "available" to all customers if it has been "denied" to some. . . . Neither is it "available" if steps have been taken to conceal it. On the other hand, the legislative history . . . argues against a construction that would require the seller to make an actual "offer" to all customers, including many who might not be interested. Between these polar positions the Commission has shifted uneasily. For some years it tended toward an ever stronger attitude coming perilously close to requiring an offer, as can be seen by . . . the . . . severe requirements of affirmative and specific notification set forth in *Kay Windsor Frocks, Inc.*, 51 F.T.C. 89, 95 (1954). . . . Then it made a slight retreat toward a more generalized notification requirement in its 1960 Guides for Advertising Allowances and Other Merchandising Payments and Services. (At 485).

In this case, however, the Commission does not merely return to its former position; it imposes a requirement considerably more severe than any which has heretofore been exacted. Even in the *Kay Windsor* case, the order was phrased in the general statutory language; here, the order requires respondent to inform its customers specifically, and in writing, of "alternative services."²⁶

The Commission's approach ignores the fact that Section 2(d) contains a *per se* proscription of conduct. A case brought under this section requires no inquiry into the competitive effects of the challenged practices. Thus, by expanding the scope of Section 2(d) the Commission runs the risk of enjoining conduct which is not injurious to competition.²⁷

²⁵ Cf. *Liggett & Meyers Tobacco Co.*, 56 F.T.C. 221, 258:

"We do not believe, however, that it is necessary to make known a promotional plan where such would be a useless or futile gesture. The question of whether the gesture would be futile is one of fact. Where it is disclosed that a seller generally does not want promotional allowances, it may be shown by the party charged with the violation that in such a case to offer an allowance would be a futile act. In this instance, the examiner has found that such a gesture would have been futile. He has had an opportunity to see and hear the witnesses. We cannot say that his findings on this issue are in error."

²⁶ The order in this case prohibits respondent from paying any promotional allowance "unless all other [competing] customers . . . are informed, in writing, of (1) the terms and conditions of the promotional program or plan . . . including the services or facilities to be furnished therefor; (2) the availability of such payments on proportionally equal terms to all such customers; and (3) if it would not be economically feasible for all such competing customers to furnish such services or facilities, alternative services or facilities such customers can furnish and be paid for on proportionally equal terms."

²⁷ "It is impossible to know how extensive and important the discriminatory effects may

In 1954, in the *Kay Windsor* case, *supra*, the Commission issued an order against a dress manufacturer prohibiting the payment of non-proportional promotional allowances. In 1959, Corwin Edwards made a study of the practical business effect of Federal Trade Commission orders. His discussion of the effects of the *Kay Windsor* order follows:

The impression is widespread in the dress industry that advertisements by large stores that have prestige facilitate the sale of the same dresses by small competing stores. The small stores themselves often share this belief. To the extent that it is true, the question arises whether selective advertising allowances are always injurious to the competitors of those receiving them. But whether there is injury to competing stores, it is obvious that the seller's promotional purpose can be accomplished better by selective advertising than by general advertising.

* * * * *

The Commission found that Windsor had violated Section 2(d) by offering advertising allowances that were not generally available. After the case, Windsor discontinued its program of selective allowances. One customer, a small department store, says that this change reduced its willingness to buy Windsor dresses. In place of special allowances, Windsor made a general offer to pay half of the cost of newspaper advertising up to a maximum of 4 per cent of the customer's net annual purchases. * * *

Many small customers have made no effort to obtain Windsor's advertising allowances. A small buyer cannot claim a small promotional allowance because he does not find it practicable to advertise by brand name a dress of which he may have bought only six copies. * * *

Indeed [a customer] * * * said specifically that the advertising of a dress by a large department store competitor generates volume for other stores as well and that he, therefore, orders the dress he sees featured in the advertising of the department store. Edwards, *The Price Discrimination Law* 181-82 (1959).

I think the time has come for the Commission to reexamine its approach to this section of the Act, and to bring it into harmony with the rest of the Act and other antitrust provisions.

have been in the situations in which the Commission took action under the proportionality provisions. Proof of injury to competition was not required by the statute, and the Commission made no effort to supply it. . . . [T]he information at hand suggests that in some cases . . . there was nothing that would have justified a finding of injury to competition had a test of this kind been applied. In other cases, the application of the test of injury probably would have resulted in findings and orders different in scope from those actually issued.

"The cases are persuasive that the price discrimination appearing in disproportionate advertising allowances and disproportionate services raise problems similar to and no more dangerous than those that appear directly in price differentials. Practices free from injurious impact appear to be common enough to raise questions about the wisdom of a rule of law that outlaws these practices regardless of their effect." Edwards, *The Price Discrimination Law* 206 (1959).

Separate Statement

69 F.T.C.

SEPARATE CONCURRING STATEMENT OF COMMISSIONERS JONES AND REILLY

JANUARY 18, 1966

The dissenting Commissioner suggests that the Commission has decided against this hapless respondent because the majority of the Commission has established a particular policy in this industry which would be defeated if this respondent, who chose to litigate the matter, is not made subject to an order to cease and desist from his present practices—practices which a great number in the industry have consented to stop.

In other words, the dissent states that because of a prior policy decision, the majority is refusing to allow this respondent to escape regardless of the merits of the case. Thus, the dissent implies that in the minds of the majority, the need for equitable disposition of a particular case is subordinated to the supposed larger interests of Commission enforcement policy.

Neither of us was a member of the Commission when the policy adverted to by the dissenting Commissioner was established. It must be clear, however, that our refusal to join in the views of the dissenting Commissioner has made him a minority of one. Thus we can assume that our motives as well as those of the other two Commissioners in the majority are being impugned.

The dissent says in effect that although the majority of the Commission *says* it is deciding this case on the merits, this is entirely disingenuous and is not to be believed.

We find the dissent's questioning of the motives of the majority deeply disturbing—just as we would find disturbing any reflection on the minority position as being motivated by a desire for consistency between the minority Commissioner's action here and his earlier opposition to the policy determination by the Commission to proceed in this fashion in these cases.

We agree with the dissenting Commissioner that the disputed issue of fact involved herein is quite simple, namely, whether the respondent made known to all of its customers that they might participate in its promotional program. We also agree that the credibility of witnesses is the central question in determining whether respondent's program was made universally available. We do not agree however that observation of the demeanor of the witnesses is the sole or paramount consideration in weighing their credibility.

Admittedly the hearing examiner is the only one who observes

Separate Statement

the witnesses and thus he is in a better position than is the Commission to consider demeanor in weighing their testimony. If demeanor were the only relevant fact in the weighing of evidence and making a determination of credibility, the findings of fact, based on oral testimony, made by the hearing examiner would in many cases be conclusive.

However, as is perfectly obvious on this record, the demeanor of witnesses is only part and, as it turns out, only a small part of the task of appraising the evidence. The content of what was said, which is available to the Commission in the transcript together with other evidence adduced, both testimonial and documentary, is in the record and the Commission suffers no handicap in being able to appraise it. Examination of all the facts led the majority to believe that the examiner was in error in accepting the credibility of respondent's witnesses on the basis of the entire record.

Far from making a simple generalized conclusion that the testimony of respondent's witnesses was unpersuasive, the majority found ample support in the record for its position that the hearing examiner's appraisal of credibility was erroneous.

Respondent called three witnesses and, in the opinion of the majority, their testimony on the basis of the entire record does not measure up to the requirements of credibility. For example, the demeanor of the witness Handelsman may have had a persuasiveness and simple candor which was heart warming, but the record also shows that upon learning that some of his non-favored customers might testify they had not been offered promotional assistance, Handelsman wrote them stating that his records showed that assistance had in fact been offered them, a statement he later admitted was wholly false.

The Commission did not have to observe Handelsman to weigh the effect of this deliberate deception on the question of his credibility. Nor did the Commission have to observe the witnesses to believe that any doubt they may have had as to whether or not they had been offered promotional assistance was planted by Handelsman's insistence in his letter that his records indicated they had received such an offer.

Obviously there is more to be weighed here than demeanor and to accept testimony in light of contradictory evidence in the record simply requires a degree of credulity which the majority of the Commission does not possess and which it cannot on these facts understand in the hearing examiner. It must overrule him

Findings of Fact

69 F.T.C.

even at the very considerable risk of having its own credibility called into question by a dissenting Commissioner.

The Commission has made a scrupulous review of the record to determine whether the initial decision, when weighed against the evidence as a whole, can properly be adopted as the Commission's own decision. The reasons for its disagreement with the examiner are fully documented in the findings of fact and the opinion.

That one Commissioner might interpret the record otherwise does not cause concern. That the motives of the majority of the Commission are impugned when there is a sound basis for its judgment in the record is deeply disturbing. The tactic of questioning the integrity of those who disagree is a well known adversary procedure. The temptation to use it should be resisted at all costs.

FINDINGS AS TO THE FACTS, CONCLUSIONS AND ORDER

The Federal Trade Commission issued its complaint in this matter on June 30, 1964, charging that respondent House of Lord's, Inc., a manufacturer of ladies' dresses, has granted promotional payments or allowances to certain of its customers while failing to make such payments "available on proportionally equal terms" to certain of its other customers in violation of Section 2(d) of the amended Clayton Act, 15 U.S.C. 13(d). A prehearing conference was held on the record on September 24, 1964, and testimony and other evidence in support of and in opposition to the allegations of the complaint were received into the record in six (6) days of evidentiary hearings held in the following month, November 1964. In an initial decision of February 11, 1965, the examiner concluded that the charges were not supported by the evidence and ordered the dismissal of the complaint.

The Commission, having considered the appeal filed by counsel supporting the complaint and the entire record, and having determined that the examiner's findings of fact should be adopted in part and set aside in part, and that the examiner's conclusions of law and order should be set aside in their entirety, now makes this its findings as to the facts, conclusions drawn therefrom, and order.

FINDINGS AS TO THE FACTS

1. through 30. The Commission finds the facts to be as set forth in findings 1 through 30 (pages 47 through 55) of the

Findings of Fact

hearing examiner's initial decision of February 11, 1965, and adopts those findings as its own.

31. In the years 1961 and 1962, certain of respondent's retail customers in Cleveland, Ohio, and Washington, D.C., received sums of money for promoting respondent's Viyella dresses while other customers located in those two market areas, and competing with those favored customers, received no such allowances. The table below lists the favored customers and a representative number of the non-favored customers in those two areas, together with their respective Viyella purchases from respondent, and the allowances received, if any, in 1961:¹

<i>Cleveland and D.C. Customers</i>	<i>1961 Purchases of Viyella Dresses</i>	<i>Promotional Allowances Received</i>
Peck & Peck*	\$ 44,510	\$ 2,000
Best & Co.*	8,768	447
Other		
<i>Cleveland Customers</i>	<i>1961 Purchases of Viyella Dresses</i>	<i>Promotional Allowances Received</i>
Halle Bros.	\$ 4,500	\$ 300
Lota Kelly	1,250	100
Higbee Co.	1,250	300
Anne Polshek Shop	400	None
Frocks & Bonnets	150	None
Milgrim Stores	150	None
<i>Other D.C. Customers</i>	<i>1961 Purchases of Viyella Dresses</i>	<i>Promotional Allowances Received</i>
Julius Garfinckel	\$ 2,000	\$ 200
Lewis & Thos. Saltz	1,000	100
Virginia Simmons	200	None
Dorothy Stead	200	None
Lelia Noyes Shop	250	None

* Peck & Peck operates approximately 60 retail stores, including 3 in Cleveland and 2 in Washington, D.C. Best & Co. operates 17 or 18 stores, including 1 in Cleveland and 1 in Washington, D.C. While the record does not indicate what part of these customers' total Viyella purchases were resold in their Cleveland and D.C. stores, respondent does not challenge the examiner's findings that such resales were in fact made and that the allowances received were spent for ads in the *New Yorker*, a national magazine that is of course distributed in those areas. Tr. 200.

¹ The following year, 1962, the six (6) nonfavored customers listed above bought in exactly the same quantities and again received no promotional money. One of the 7 favored customers—Lewis & Thos. Saltz—also bought in the same quantity and received the same promotional allowance as in 1961; another, Julius Garfinckel, bought in the same quantity (\$2,000) but received a slightly smaller promotional allowance (\$150 instead of \$200) than

Findings of Fact

69 F.T.C.

33. On or about September 24, 1964, several weeks before the hearings in this matter began, respondent's attorney was supplied with a list of complaint counsel's prospective witnesses, including the 6 nonfavored customers listed above. The following day, September 25, 1964, respondent wrote each of them a letter expressing "surprise" at the customer's intention of testifying against it, and asserting flatly that "our records" show House of Lord's "did in fact" make the allowances in question available. One of the letters reads as follows:

We have been notified by the attorneys for the Federal Trade Commission that they intend to call you as a witness in a proceeding instituted against House of Lords, Inc., for an alleged violation of the Clayton Act, to establish that House of Lords, Inc. did not make available to you for the years 1961 and 1962 the co-operative advertising program for Viyella dresses which was offered to competing firms in your city.

According to the members of our staff and our records House of Lords, Inc. did in fact make available to you this advertising program for the years in question. It comes as a surprise to us that if you are called, you will so testify.

We would appreciate it very much if you would let us know whether it is true that you are making such a claim and if so, in what manner did we fail to make our advertising program available to you. Please accept our thanks for your courtesy and co-operation.²

At the hearing, respondent's president, Handelsman—the author of this letter—testified as follows:

Q. Are there company records to this effect?

A. It's all verbal.

Q. . . . What about those [customers] who, as you stated were offered and did not wish to avail themselves of it? Was any record kept of this?

A. None whatsoever.³

In other words, Handelsman conceded that the statement he had made to complaint counsel's prospective witnesses—that "[a]ccording to . . . our records House of Lords, Inc. did in fact make available to you this advertising program for the years in question"—was wholly false; there were no such "records."

34. All six (6) of the nonfavored customers replied to this letter.

the year before; Peck & Peck's purchases and allowances were both much smaller than in the preceding year (\$9,950 purchases and \$300 allowances); Best & Co. increased its purchases to \$10,497.50, and received a promotional allowance of \$500; Halle Bros. bought much less, only \$1,500, but received a comparatively larger promotional allowance than the year before (\$200 in 1962); Lota Kelly bought in the same quantity (\$1,250) but received a smaller allowance than in 1961 (\$75 rather than \$100); and Higbee, which had received the highest allowance of them all in 1961 (\$300 on purchases of \$1,250), received no promotional allowances at all on its smaller \$750 purchases in 1962.

² CX 41 (emphasis added). See also CX 42, 44-47.

³ Tr. 101, 112. See also 617-618.

Findings of Fact

(a) *Anne Polshek Shop, Cleveland:*

Rec'd your letter of the 25th to-day & surprised at its contents.

. . . I told them [Federal Trade Commission attorneys], I was told that any newspaper adv. I did, would be paid prorata by you, on your product, but that I felt I was not qualified to make any demands, because I did not buy sufficient quantities to advertise.

. . . The U.S. representative certainly misunderstood me. He had asked me for Lord's Invoices & I said I hoped I was not getting involved into any unpleasant situations, because I had always rec'd cooperation from your company Mr. Handelsman.

If my answers were misinterpreted, I am truly sorry, because I well recall being told about reimbursement towards Viyella ads.⁴

(b) *Frocks & Bonnets, Cleveland:*

Your salesman did offer special benefits for advertising but since we are a small specialty shop we do not advertise.⁵

(c) *Milgrim Stores, Cleveland:*

For the years 1961 and 1962 I recall your salesman offering advertising monies for ads on Viyella fabric. We did not avail ourselves of this offer.⁶

(d) *Virginia Simmons, Inc., Washington, D.C.;* A representative of Mrs. Simmons wrote on her behalf that she was:

. . . anxious for you to know how distressed she is about this misunderstanding.

We have no intention whatever of testifying against you in this matter. In the first place, we have never done any cooperative advertising and do not intend to. We are a small shop, as you know, and this type of advertising is too expensive for us. For this reason we undoubtedly paid no attention to your offer.

We did show a man from the Federal Trade Commission some old stock records at his insistence, after protesting that we did not want in any way to harm our fine business and personal relationships with your firm. . . .

Please rest assured of our cooperation with you in every way possible.⁷

(e) *Dorothy Stead, Inc., Washington, D.C.:*

I wish to advise you that I was not employed by the Dorothy Stead shop during that period. However, I did check the invoices for this Shop during said period and found that there was not enough purchases to warrant advertising.

. . . At that time, I was employed by Lewis and Thomas Saltz and they were offered shared advertising which they accepted.⁸

(f) *Lelia Noyes Shop, Washington, D.C.:*

. . . I had a manager during the year in question, 1961, who handled such matters for me, and all I could testify would be that she may well have received an offer which she would automatically have declined.

⁴ RX 5 (emphasis added).

⁵ RX 4.

⁶ RX 2.

⁷ CX 48.

⁸ RX 1.

Findings of Fact

69 F.T.C.

. . . I told him [Federal Trade Commission investigating attorney] I knew nothing about the advertising program in question, but that it was known to all my friends in the New York showroom [House of Lord's] that I would not be interested.⁹

35. One of these customers, however, Frocks & Bonnets, of Cleveland, did not reply immediately to respondent's September 25th letter. "I was called long distance on two or three occasions. I was busy. I couldn't come to the phone. I was out of the store and they left a call for me to get in touch with them [respondent House of Lord's]. I didn't, but they called me again. . . ." ¹⁰

Q. What was the substance of the conversation?

A. Getting me to write the letter. *I was requested or asked to write the letter saying I had received—I can't think of the words I want to use—I had been offered advertising. That is what they wanted.*¹¹

Asked what caused her to write the letter referred to above,¹² the witness explained:

A. The telephone calls asking me for just that type of letter, and as I say, to give them the benefit of the doubt in case he [respondent's salesman] had offered something.¹³

On cross-examination, the witness was asked whether respondent's representatives had "dictated" that letter for her:

A. You are asking me did they dictate the words?

Q. Yes, ma'am.

A. Those were my words, but they just asked me to write a letter in words to that effect, let's put it that way.

Q. To use the vernacular, no one twisted your arm to write this letter?

A. Well, I am giving you the facts. I don't know whether you call twisting it around—

Q. What fears did you have that something might have happened to you if you didn't write it?

A. I didn't have any fears. I told you, explained that I merely tried to give House of Lord's the benefit of the doubt, that they may have offered me some advertising. Do you understand that? . . . I can't say whether there would be any form of retaliation such as locking me up. What fear could I have along that line?

Mr. Rosen: This witness is being badgered. She has answered the question that she had no fears, and therefore she has no fears.

Hearing Examiner Tinley: If you are objecting on that ground, I will ov-

⁹ CX 48.

¹⁰ Tr. 381-382.

¹¹ Tr. 383 (emphasis added).

¹² RX 4.

¹³ Tr. 386 (emphasis added).

44

Findings of Fact

errule the objection. It has been rather difficult to get down to the precise point.

If I understand, what you are saying is that you did not write the letter because you had any fear of any retaliation by House of Lord's against you if you didn't?

The Witness: What could they do to me?

Hearing Examiner Tinley: Just answer my question. Did you have any fear of any sort of retaliation by House of Lord's?

The Witness: Of course not. I am trying to explain. They couldn't chop my head off or lock me up.¹⁴

36. We find no credible evidence in this record that any one of the six (6) nonfavored customers listed above was offered a promotional allowance of any kind by respondent in 1962 or that any of them but Milgrim Stores was offered such an allowance in 1961. These customers testified as follows:

(a) *Anne Polshek Shop, Cleveland* (witness Anne Polshek):

Q. During 1961 or 1962, were you offered advertising allowances to promote Viyella merchandise?

A. Well, not that I recall.

Q. You are not telling this Court that it was not offered to you as a flat statement?

A. I can't make a flat statement, no.

Q. Now, at the time you made your purchase, you knew that there was an advertising program which was involved?

A. No, I didn't know then.¹⁵

(b) *Frocks & Bonnets, Cleveland* (witness Laura Bergner):

Q. Did Mr. Crane [respondent's Cleveland salesman] offer you any money for any form of advertising?

A. No.

Q. Now, when you were asked a question on direct examination, "Did Mr. Crane offer to you an advertising program," you said you do not remember. Is that the case?

A. That is right.

Q. You don't remember?

A. I don't remember any special program.

Q. Now, if Mr. Crane offered you this advertising program, he would have told you that you could have had one-half the cost of any advertising pro-

¹⁴ Tr. 389-391.

¹⁵ Tr. 415-416, 418. The witness learned about respondent's "promotional program" when she was called on by the Commission's investigating attorney. Later, when she reported that interview to respondent's salesman, he then assured her that she would be given "the same consideration as we do any other store." Tr. 421.

Findings of Fact

69 F.T.C.

gram that you engaged in in regard to Viyella. . . . If he had, this is what he would have said and I ask you now to tell us again whether any such statement to you refreshes your recollection in regard to this.

A. Well, the only thing I can say, when I met him in the showroom, that he is always busily engaged with the big stores. I have been a little side issue waiting in turn to look at the line and buy it and get going. I don't remember any of this. I don't think I was in on any real important advertising or anything offered to them. . . . Well, I think if it had been specifically offered me in something special, *I would have remembered.*¹⁶

(c) *Milgrim Stores*, Cleveland (witness Franklin M. Milgrim) :

Q. In the year 1962, were you offered an advertising allowance?

A. I don't remember any discussion in '62.

Q. Please, if you can, answer my question. Were you offered an advertising allowance in 1962?

A. No.¹⁷

(d) *Virginia Simmons, Inc.*, Washington, D.C. (witness Virginia Simmons) :

Q. Mrs. Simmons, did House of Lord's or did any representative of House of Lord's offer advertising allowances to Virginia Simmons, Inc. during 1961 and 1962 to promote Viyella products?

A. . . . As far as when Mr. Stewart [Federal Trade Commission attorney] came and talked to me, I really didn't remember anything specific about it. . . . The only part that I could say was accurate is that *I did not request anything. I could not say that I was absolutely sure that I was not offered it.* I didn't recall it definitely at the time. . . . But I have not signed a statement and that's his word against mine. . . .

Yes. I really feel that it was [offered]. . . .

¹⁶ Tr. 374, 376-377 (emphasis added). See finding number 35, *supra*, for the witness' explanation of the letter she wrote earlier, at respondent's request, in which she had said "[y]our salesman did offer special benefits for advertising. . . ." (RX 4.) Pressed by respondent's counsel on the conflict between that letter and her testimony, she replied: "I wrote that . . . just to quiet you [respondent Lord's]. . . . So just to give you the benefit of the doubt." Tr. 378 (emphasis added). The examiner struck that reply as "unresponsive" to the questions "whether you wrote this" and whether "[y]ou have seen the letter?" We think that ruling was erroneous. There was no lay jury to be confused or misled by the witness' "unresponsive" explanation; indeed, a highly misleading impression would have been left on the record without it. It might also be noted that the strictness of this ruling was in marked contrast to the scope allowed respondent's counsel in "leading" not only witnesses who were patently "friendly" to his client but even his own officials and employees. See, e.g., VI *Wigmore on Evidence* 538-539 (3d ed. 1940); *J & B Motors v. Margolis*, 257 P. 2d 588, 591 (1953); "Adverse Party Examinations," *Trial Lawyer's Guide* 1, 21-23 (1962).

¹⁷ Tr. 287. As discussed below (finding number 38), the witness *had* been offered an allowance in 1961, the year he dealt with respondent's president, Handelsman. On cross-examination by respondent's counsel, the witness explained that when he wrote the letter quoted above (RX 2), he had made no attempt to distinguish the two years or the two Lord's officials. TR 297. "I know of at least one conversation with Mr. Handelsman. I can't remember of any with Mr. Crane." Tr. 289. In view of this clear-cut statement, respondent is not helped by the witness' later acquiescence in counsel's statement that "you do not deny that such a conversation *might* have taken place." Tr. 290 (emphasis added).

Yes, I feel almost certain that she [respondent's saleslady, Cole] did. We did discuss the plan. I mean, we did discuss advertising, and an offer was made.¹⁸

Q. Mrs. Simmons, how many suppliers did you deal with in 1961?

A. Well, I guessed around one hundred. We started with close to 100. We now have about 225. So I would say it's just cutting it in half, around 100.

Q. Can you recall, if you had to, which manufacturers offered you allowances and which did not?

A. I am not going to answer that. I can think of two who did. *But I am not going to get involved with any more manufacturers.*¹⁹

(e) Dorothy Stead, Inc., Washington, D.C. (witness Alice Seitz) :

Q. Do you recall whether or not anybody on behalf of Lord's Sportswear, Inc. or House of Lord's, Inc. ever offered or made available, on an affirmative basis, any advertising or promotional allowances to Dorothy Stead for the promotion of Viyella merchandise?

A. I don't remember at that period. . . .

Q. I want to confine this question specifically to Dorothy Stead. At Dorothy Stead in 1962, were you offered any advertising allowances by House of Lord's?

A. No.

Q. In 1962 you said that you did not remember.

A. No I don't.

Q. Is that not what you said?

A. I said no, that I had not been offered it.²⁰

(f) Lelia Noyes Shop, Washington, D.C. (witness Maude M. Moffett, manager) :

Q. During the period that you dealt with the House of Lords people, did anyone, including Mrs. Cole [respondent's saleslady] or Mr. Handelsman or any other employee, offer you as a representative of Lelia Noyes Shop an advertising allowance?

A. . . . I just don't recall whether they did or not, but there would be no

¹⁸ Tr. 522-525, 537, 540 (emphasis added).

¹⁹ Tr. 540-541 (emphasis added). The witness had first testified, as noted, that she had no recollection of an "offer" prior to a visit at her place of business by the Commission's investigating attorney, tr. 523, but that she had later received a written offer in the mail. In her subsequent testimony, however, she attempted to place the written offer before the investigator's visit. Tr. 526. Respondent's attorney conceded that this was not so: "We will concede for the record that no letter of this kind was addressed to any of our customers in 1961 or 1962, and that the letter that she has reference to is current practice." Tr. 527.

²⁰ Tr. 131-132, 137. The witness was not employed by Dorothy Stead, Inc., until May of 1961—after the latter had already done its buying for the fall season of that year (usually done in March and April). Hence her knowledge as to whether respondent had offered the allowance to Dorothy Stead, Inc., was limited to the following season, 1962.

Findings of Fact

69 F.T.C.

point in anyone offering Mrs. Noyes' shop anything for advertising. . . . We did no—virtually no advertising *in newspapers*.

Q. Did she [respondent's saleslady] at any time explain the cooperative advertising program that the House of Lord's had to offer you?

A. Well, *I don't recall that she did*, but she would have had no reason to.

Q. . . . Now, isn't it the case that you have no memory concerning it?

A. I can't recall anything about it.

Q. Is it *possible* that such a proposal may have been made to you and you just simply don't recall it?

A. Well, it could well be, certainly, because I just don't recall anything about it.²¹

Mrs. Noyes, owner of the shop, testified to the same effect:

Q. During the year 1961 were you offered an advertising allowance by House of Lords or any of its representatives?

A. *I cannot answer that. I do not know.* . . . I have never used any advertising of that kind, and I do not remember the many offers that have been made to me. I just couldn't remember them. They automatically are rejected.

Q. Do you know what the advertising program of the House of Lords was in 1961 and 1962?

A. No, I don't. I would imagine that they offered it to me because we have always been on very friendly terms, but *I cannot say that it was offered to me*. I have no remembrance. I think it would be likely, but I can't be—you are not interested in likelihood, I suppose.

Q. If I were to tell you that Mrs. Cole [respondent's saleslady] did propose to you this advertising program, would you say that it *could* have happened?

A. I would say it *could* have happened. . . . I think it was likely because we had a profitable and good relationship. . . .

Q. In other words, you couldn't possibly say that you were offered an advertising allowance by Mrs. Cole?

A. No. I couldn't say I was, and I couldn't say that I was not.²²

37. The contrary testimony offered by respondent's witnesses—its president (Handelsman), its salesman in the Cleveland territory (Crane), and its saleslady in the Washington, D.C., area (Cole)—is not persuasive. Handelsman testified that, in "April of each year, when our Viyella line for the fall season, which is the only season that we make Viyella in, is ready, I make a trip with our representative salesmen around the United States, in about approximately fifteen cities. Advance notice is sent out to the

²¹ Tr. 304, 309, 313 (emphasis added).

²² Tr. 332, 335, 338-340, 348 (emphasis added).

Findings of Fact

stores that we have, that we do business with, that we will be in their respective city on the respective dates with our Viyella collection. When they come to the showroom in the hotel, where we show our merchandise, we then offer to them, after they see the Viyella dresses, our advertising program, which is a 50-50 cooperative advertising, depending on the size of the ad that they themselves would like to do, or the type of ad that they would like to do, not necessarily newspaper. These stores—some stores have accepted and some stores have refused for reasons of their own, primarily because they don't buy that much and they are too small and they have no advertising program whatsoever.”²³ The offer is made, he says, by “our respective salesmen as they were waiting on them [retail customers], in either the showroom or in the respective cities where they visited. They were offered—they showed the line and they then told them that they have a program of cooperative advertising, depending on the type that they want to run.”²⁴ Asked what “instructions” he gives his sales staff “in regard to passing on the Viyella program” to their retail customers, Handelsman testified: “Well, to go full force to all customers who buy Viyella and offer it to them.”²⁵

Samuel Crane, respondent's traveling salesman in the Cleveland area, testified that he offered a promotional allowance to two of the nonfavored Cleveland customers—Anne Polshek and Laura Bergner (Frocks & Bonnets)—but that they turned it down. He says he “told them there was money to be had, advertising money on a 50-50 cooperative basis on the Viyella, did they care to participate. . . . I did not mention any sort [particular type] of advertising. It was up to them if they wanted to advertise.”²⁶ Salesman Crane, testifying in November 1964, was able to recall exactly what he had said to those two customers and what they had said to him in March of 1961 and 1962. He testified that, in response to his 1961 “offer” of promotional money, Bergner of Frocks & Bonnets, “said, ‘We don't do any advertising,’ and she could not accept any of the money.”²⁷ In 1962, he relates, Bergner “said no, she cannot participate in these type campaigns at all. She does no type of advertising.”²⁸ He “told Miss Bergner that we have a program on Viyella and that it was under a 50-50

²³ Tr. 73-74.

²⁴ Tr. 80.

²⁵ Tr. 594.

²⁶ Tr. 470, 472.

²⁷ Tr. 470.

²⁸ Tr. 473.

Findings of Fact

69 F.T.C.

basis, advertising campaign, was she interested in this campaign, and she said no, definitely not. . . . I told her the campaign was —that we still had the campaign on Viyella, was she interested, and she said no, she is not interested in it at all under any conditions.”²⁹ According to Crane’s testimony, his offers to Anne Polshek were similarly rejected. In 1961, she “said she doesn’t do any sort of advertising at all, therefore, she couldn’t accept anything that I could offer.³⁰ The following year, 1962, Polshek “told me she just does not advertise.”³¹ He told her “that we have the money available on Viyella and would she be interested in the program, it was on a 50–50 basis, and Miss Polshek said no, she was not interested in it.”³²

While he had no difficulty recalling these detailed conversations with these particular customers, salesman Crane was unable even to identify any of the other customers that he allegedly made the same offer to on the same day. On cross-examination by complaint counsel, Crane testified that he calls on approximately 300 to 400 customers in his sales territory each year, and that about 8 or 9 of them visited his Cleveland hotel showroom during his 1961 and 1962 trips to that city:

Q. Do you recall the identities of the customers that visited you in 1961 and 1962 in the Statler Hotel?

A. I would have to go to my book.

Q. How can you possibly state that you offered allowances to Laura Bergner and Anne Polshek in the Statler Hotel? . . . You remember *their* being there but you don’t remember the identity of any *other* customers?

A. I can identify other customers, yes, I can, but I know they were there on these dates made by me. They were there and I worked with these people myself.

Q. But you do not recall all the customers who visited the Statler in 1961 and ’62?

A. I couldn’t say exactly, but as I say, I have my book at home. I could tell you who is in it in 1961 and 1962 at the Statler Hotel.

Hearing Examiner Tinley: . . . Did you have occasion to refresh your recollection with regard to these two witnesses [Bergner and Polshek] before you testified from your books?

The Witness: I know they were there.

Hearing Examiner Tinley: I am asking you did you refresh your recollection by consulting your books with regard to these two customers before you testified?

²⁹ Tr. 477–478.

³⁰ Tr. 472–473.

³¹ Tr. 474.

³² Tr. 478.

The Witness: No.

Hearing Examiner Tinley: You did not?

The Witness: No, but I know they were there.³³

On redirect, respondent's counsel "rehabilitated" his witness this way:

Q. And your recollection of having conversations with Miss Bergner and Miss Polshek is based on part upon the fact that you talked to all without exception?

A. That is right.

Q. And you couldn't have missed one if you wanted to?

A. Not at all.³⁴

In other words, witness Crane had no present recollection whatsoever of having talked to Bergner and Polshek about the subject matter of this proceeding.

38. Respondent's dealings with the other Cleveland customer who received no promotional allowances in 1961 and 1962—Milgrim Stores—illustrate a particularly significant aspect of this promotional "program." The record is clear that Milgrim was, in fact, *offered* promotional money in 1961.³⁵ And Handelsman, respondent's president, says it was offered to Milgrim again the following year, 1962. Explaining that he generally accompanies salesman Crane on his trip to Cleveland in the spring, Handelsman said he told Milgrim "about the Viyella advertising allowance. . . . That we have a cooperative advertising deal on a 50-50 basis, if he wanted to run anything. He said, 'Joe, we are primarily a dress-type of organization. We only buy Viyella to satisfy a few special accounts. I don't buy enough—I wouldn't even buy enough to fill an eyelid or eyelash or eye cup or whatever it is. But we are strictly evening gowns or dressy clothes. . . .' He rejected it fully. He probably picked up three or four or five dresses."³⁶ That was in 1961. "It was 1962 when it was brought up again. He said, 'Joe, forget it. As I told you before, we don't do it.'"³⁷

Milgrim testified, however, that he only talked to Handelsman in 1961, the year he did his buying at respondent's showroom in New York City; the next year, 1962, he bought Viyella not from

³³ Tr. 482-487 (emphasis added.)

³⁴ Tr. 491 (emphasis added).

³⁵ The record is not clear, however, as to exactly *what* he was offered. He says that "[a]dvertising money was discussed on viyella merchandise, I believe by Mr. Handelsman and myself. . . . I can't remember the exact nature, except that we would help with an ad." Tr. 287, 288.

³⁶ Tr. 589-590.

³⁷ Tr. 590 (emphasis added).

Findings of Fact

69 F.T.C.

Handelsman, but from salesman *Crane* at the Statler Hotel in Cleveland.³⁸

Q. In the year 1962, were you offered an advertising allowance?

A. I don't remember any discussion in '62.

Q. Please, if you can, answer my question. Were you offered an advertising allowance in 1962?

A. No.³⁹

As will be discussed below, the fact is that respondent's salesmen are not allowed to offer promotional allowances to customers; only Handelsman himself has the authority to make such an offer.

39. Mrs. Dorothy Cole, respondent's saleslady in the Washington, D.C., area in 1961 and 1962, was the most "certain" of respondent's three witnesses: ". . . Mr. Handelsman will always tell us [sales personnel] that there is advertising money; that we are to tell it to our customers; it's a 50-50 basis, regardless of what type of advertising that they want to do; that's up to the stores to do it. But our problem which he impressed upon us at all times was that you must tell your customers that they have this money; that it is to your advantage; that you get better sales to have it advertised; that the fabric becomes more important. . . . This is what he impressed upon us that we should do. . . . Mr. Handelsman never stopped telling us that we should advertise, that we should tell our customers and make phone calls, do anything, but *try, even after they say they may not be interested in an ad, to try to persuade them in to it.*"⁴⁰

Mrs. Cole was equally certain that she had offered promotional money to the three nonfavored Washington, D.C., customers called as witnesses here. "[Virginia] Simmons was a new customer at the time [1961]. And I showed her the advertising book and the type of advertising that we do in Viyella. And I said that the offer would go for her, and it would be an important item for her type of customers, being in the outskirts of town, suburban area, and that it would be to her advantage to take this as a 50-50 percent basis; that it would also establish her and her people, that the name would be there, and she would only have to pay fifty percent of it. She said that she was not at all interested. . . . She did not want to have any part of advertising of anybody's, ours or anybody else's, no matter what it was,

³⁸ Tr. 287.

³⁹ *Ibid.*

⁴⁰ Tr. 548-550 (emphasis added).

44

Findings of Fact

even if it was one hundred percent; that if anybody gave her one hundred percent of advertising, they couldn't handle it, they didn't want to advertise . . . She doesn't want to advertise anybody's, anybody's merchandise." ⁴¹

In regard to Dorothy Stead, Inc., also of Washington, D.C., saleslady Cole testified that Mrs. Stead, the owner of the shop, came to respondent's New York showroom with her buyer in 1961, and that the buyer, a Mrs. Seitz, came to the showroom alone in 1962. Cole says that, in response to her "offer" of promotional money in 1961, Mrs. Stead rejected it, saying she "doesn't advertise; she can't use any allotment, any allowance given to her."⁴² In 1962, the Stead buyer, Mrs. Seitz, allegedly declared that "Dorothy Stead doesn't advertise, so she couldn't accept money."⁴³

Saleslady Cole was equally unsuccessful in her alleged efforts to "persuade" the Lelia Noyes Shop (Washington, D.C.) to accept respondent's promotional money. She testified that she sold Viyella dresses to Mrs. Noyes and her employee, a Mrs. Moffett, in Lord's New York showroom in both 1961 and 1962. "In 1961, I offered the Viyella money as advertising in any form that they wanted to use it on a 50-50 basis. And I said the same thing in 1962 . . . At either time they did not accept the offer; they don't advertise . . . The offer was made as a 50-50 advertising for Viyella to be used in any way that they wanted to use it, provided that it mentioned Viyella and, maybe, I would say that if they mentioned the House of Lord's it would be nice. But they just said that they don't advertise." ⁴⁴

40. The first difficulty with this testimony of saleslady Cole is that it is not, as pointed out in finding 36, *supra*, supported by the testimony of those nonfavored customers to whom she allegedly made those "offers." There is, however, a second difficulty with her testimony—in an incident involving one of the favored customers, Lewis & Thomas Saltz, a Washington, D.C., retailer, she was squarely contradicted not only by two representatives of the Saltz firm but by no less than three (3) contemporaneous documents, two of them written by her own firm.

This customer, Saltz, had been receiving a promotional allowance from respondent Lord's for several years, including 1961. In 1962, however, Saltz had a new buyer, a Mrs. Helen Francis, who

⁴¹ Tr. 557-560.

⁴² Tr. 586.

⁴³ *Ibid.*

⁴⁴ Tr. 561.

Findings of Fact

69 F.T.C.

knew nothing about the alleged "offers" of promotional allowances she was supposed to receive from Lord's. She went to respondent's New York City showroom, placed Saltz's 1962 order for Viyella dresses with Lord's saleslady, Cole, and returned to Washington with no promotional allowance. She testified positively that "it was never discussed with me in the showroom."⁴⁵

Saleslady Cole agrees that she sold Viyella dresses to Mrs. Francis at the showroom in 1962, but insists that she did in fact offer her the promotional allowance:

Q. Did you at that time offer her the Viyella advertising program?

A. *I remember it distinctly because I explained to her and showed her ads in our ad book like Viyella was advertised by Lewis & Thomas Saltz in the past and it would still go; that, if she were buying it, it would still be the same procedure, that Lewis & Thomas Saltz would buy it—would advertise Viyella on a 50-50 basis.*⁴⁶

In his initial decision, the hearing examiner concluded that this "directly conflicting testimony by each of these witnesses is *equally credible.*"⁴⁷ He thought Saltz, the customer, "had a responsibility to instruct its new employee concerning the matter," *i.e.*, to instruct her to *ask for* the promotional allowance, and that the incident "was the result of human failure, and did not represent a deliberate effort by respondent not to make its advertising program available to Saltz in 1962."⁴⁸

We find nothing "equally credible" in saleslady Cole's testimony that she offered the promotional allowance to Saltz's new buyer in 1962. When the latter got back to Washington, her manager, a Mr. Steinback, "asked me if I had been given this allowance I said I had not even discussed it."⁴⁹ The Saltz manager promptly wrote Mrs. Cole the following letter (August 14, 1962):⁵⁰

Mrs. Francis has just told me of her conversation with you in regards to Viyella cooperative advertising.

I am amazed to learn that after years of allocating to us money for such advertising you have decided to discontinue it. The lack of an advertising appropriation will not only be detrimental to our efforts of selling Viyella dresses but I also feel that making money available to Abercrombie & Fitch and Peck and Peck and not to us, as you have in the past, is actually unfair and discriminatory.

⁴⁵ Tr. 266.

⁴⁶ Tr. 554-555 (emphasis added).

⁴⁷ Initial decision, p. 62 (emphasis added).

⁴⁸ *Id.*, at 62-63.

⁴⁹ Tr. 268.

⁵⁰ He also confirmed in his testimony here that he had in fact talked to his new buyer about her failure to get the Lord's allowance immediately after her return from New York. Tr. 275-276.

Findings of Fact

I would very much appreciate it if you would reconsider your decision and I do hope you can see your way clear to again make an appropriation available to us for this coming season.⁵¹

In her testimony, Mrs. Cole conceded that she received this letter.⁵² But she didn't answer it; she took it to Handelsman's office, and one of his secretaries wrote a reply letter (August 20, 1962) to the Saltz manager:

Your letter addressed to Mrs. Cole regarding advertising for a cooperative Viyella ad was given to me for reply.

Mr. Handelsman, who is the head of our firm and *handles all advertising* is presently in Europe and is expected back at the end of the coming week. We will discuss your letter with him and the *conversation had with Mrs. Cole*. I know that you did receive some advertising allowance last season, but *our budget was severely curtailed this season and we have had to reduce our ad cooperation*.

We will definitely advise you within the next week as to whether or not we will be in a position to be of service in planning a cooperative ad this season.⁵³

When respondent's president, Handelsman, got back from Europe, he wrote the Saltz manager a letter (August 22, 1962) reading in part as follows: "*Our advertising budget was cut considerably this year and we naturally had to make proportionate cuts in allowances to our customers*. However, accounts who had \$100 or less are getting the same allowance this year and according to our records we did give the store [Saltz] \$100 in 1961 and are giving the same sum, \$100 in 1962. The original copy of *my advertising list was locked in my desk* and the duplicate copy did not have complete information which led to this misunderstanding."⁵⁴

In short, neither saleslady Cole nor any other person in the House of Lord's organization had the authority, in Handelsman's absence, to "offer" a promotional allowance to a customer,⁵⁵ even

⁵¹ CX 18 (emphasis added).

⁵² Tr. 555.

⁵³ CX 19 (emphasis added).

⁵⁴ CX 20 (emphasis added).

⁵⁵ As noted above (finding number 38), another customer, Milgrim of Cleveland, had received the offer in 1961, when he dealt with Handelsman himself, but not in 1962, when he dealt with salesman Crane. Tr. 287. The testimony of another of the favored customers, Bruml of Lota Kelly Sportswear, Inc., Cleveland, is particularly revealing on this point:

Q. Mr. Bruml, did you deal with Mr. Sam Crane or Lords Sportswear during these two years or did you deal with Mr. Joseph Handelsman?

A. I dealt with both of them concurrently. *Mr. Crane would exhibit the line, Mr. Handelsman . . . would then ask me what kind of [advertising] plans I would like to make*. The two gentlemen worked together.

Q. In so far as advertising allowances were concerned, with whom did you deal?

A. Mr. Handelsman.

Findings of Fact

69 F.T.C.

one who was known by the Lord's employees to have received it in past years, who had bought in substantial quantities (\$1,000 worth of Viyella dresses in each of the years 1961 and 1962), and who was *demanding* the allowance in no uncertain terms—including such terms as "unfairness" and "discrimination." In the face of such evidence as this, the testimony of salesman Crane and saleslady Cole that they affirmatively and routinely "offered" the allowance to each and every one of their approximately 350 Viyella customers, including the 6 nonfavored customers that testified here (annual purchases of \$150 to \$400)—indeed, that they "tr[ied] to persuade them in to it"⁵⁶—strains our credulity.

41. There is no reliable evidence in this record that the 6 nonfavored customers who testified here would have rejected a bona fide promotional allowance if it had in fact been offered to them on "proportionally equal" terms. It is not a fact that they engage in no advertising. Laura Bergner (Frocks & Bonnets), of Cleveland, testified that "we don't advertise," but then went on to explain that manufacturers of wearing apparel attach a special and highly restricted meaning to the word "advertise." "Lots of manufacturers do not accept that [advertisements in the local *Heights* newspaper] as even advertising. They want you to ad-

Hearing Examiner Tinley: You mean by that that you did not have any discussion of advertising allowances with Mr. Crane?

The Witness: That is right.

[Tr. 458-459 (emphasis added).]

In other words, the Cleveland and Washington, D.C., customers that got the allowances were those that dealt with Handelsman himself; those that didn't get the allowances were those that dealt with salesman Crane or saleslady Cole. See e.g., tr. 180 (Dorothy Stead, Inc.); tr. 198, 487 (Peck & Peck); tr. 217 (Julius Garfinckel); tr. 304 (Lelia Noyes); tr. 373 (Frocks & Bonnets); tr. 396 (Halle); tr. 415 (Anne Poishek); tr. 543 (Simmons); and tr. 564 (Best & Co.).

⁵⁶ Tr. 550. In fact, respondent has never had enough advertising money to make an "unlimited" 50-50 offer to all of its Viyella customers. Lord's does not use its own funds to promote Viyella; the maker of the Viyella fabric, an English firm (William Hollins & Company, of London), carries the full cost of promoting respondent's Viyella dresses, with House of Lord's simply acting as the distributor of the fabric-maker's advertising money. In 1961, it allowed respondent \$16,000; in 1962, the "budget" was cut back to \$12,000. Tr. 74-76, 114-115, 508-510, 603-604. If \$16,000 was divided equally among 350 customers, it would amount to just over \$45 for each customer. (The English fabric-maker would "go along with" perhaps another "one thousand or two thousand," but beyond that Lord's would have to spend its own money. Tr. 75, 510.) To give one customer an "unlimited" allowance (e.g., \$2,000 to Peck & Peck for a *New Yorker* magazine ad) necessarily means that respondent must impose "limits" on the amounts given to its other customers. Several of the "favored" customers were quite clear that there were, in fact, such limits, that they could not have all the promotional money they wanted. See e.g., tr. 217-219 (Garfinckel); tr. 284-285 (Saltz); tr. 438, 440, 454-455 (Lota Kelly); tr. 397, 410-411 (Halle). See also finding number 42, *infra*.

44

Findings of Fact

vertise in the morning Plain Dealer before they even call it advertising, and we have never done that." ⁵⁷

Q. Do you do any form of promotional advertising?

A. No, just our windows and the stuffers with the statements [advertisements mailed to customers along with end-of-month statements or bills]. If we buy stuffers, that is the only form of advertising we use. . . . Stuffers where you buy them at a thousand. You know, they print them for different stores, and then you buy so many a thousand. They put them in your statements.

Q. If you were offered a sum of money to pay for a window display or to buy some stuffers, would you have accepted this?

A. Yes. That type of thing, yes.

Q. Did you ever discuss this with Mr. Crane [respondent's Cleveland salesman]. . . ?

A. No.

Q. "We will pay one-half without specifying stuffers, window displays, or any other means." If that had not been specifically mentioned but just simply the advertising program, would you have stopped to ask the question "Well, does it mean stuffers as against newspaper advertising?"

A. Well, usually the [manufacturer's] salesman shows you the picture of the stuffers and that is specifically shown to you, ordinarily, with all lines.

Q. Isn't it true that the stuffers are made by the store in question at all times?

A. No, no, no. We do not make our own stuffers, never. The manufacturer has those printed and we are shown the copies of the prints, and then we see the styles and know whether we want to go into it or not, and the cost per thousand is given us.

Q. And is it your testimony this morning, Miss Bergner, that Mr. Crane did not offer you a stuffing program specifically?

A. That is right. I have never seen a stuffer on Viyellas, that's right. Whether you ever published or printed them, I don't know, because I have never seen them.

Q. If you were informed that House of Lord's had no stuffers but that if you wished to engage in any stuffing program you would have to have your own printed and then half the cost would be rebated to you, would you have engaged in such a program?

A. Well, if the cost wasn't too great and I could afford it, it has always been a good source of advertising for us because we have handled our credit system since the beginning of the business, and we do have our special accounts and we do mail those stuffers in the statements.

Q. Would you have prepared the stuffers on your own?

⁵⁷ Tr. 874. Another of the witnesses had written Lord's:
". . . I was told that any newspaper adv. I did, would be paid pro-rata by you. . . ." RX
5 (emphasis added). Another testified: "We did . . . virtually no advertising in newspapers."
Tr. 304 (emphasis added). And another: "I have never used advertising of that kind." Tr.
332 (emphasis added).

Findings of Fact

69 F.T.C.

A. If I had to have them printed, I had never done that, but had the cost been right, there is a possibility.

Hearing Examiner Tinley: Counsel is asking you if you would be willing to pay half the cost if House of Lord's paid half the cost if you had them printed.

The Witness: Yes, I understand that. I am saying if the cost wasn't too great, there is a possibility.

Q. And that possibility would have included the obligation on the part of your shop to prepare its own stuffers?

A. That is right.⁵⁸

Anne Polshek, also of Cleveland, testified that she advertises “[i]n the Cleveland Plain Dealer, in the Cleveland Press, in the Sun Press.”⁵⁹ Virginia Simmons, of Washington, D.C., testified that, in 1961 and 1962, she advertised in “[s]mall publications, such as the Bethesda Advertiser; scattered ads. There was no steady continuity in advertising; just whenever we could afford it or felt that we wanted to push a sale or a general ad attracting attention to a new shop. Since then we have dropped that and the only publication that we have used was the Georgetown Spectator, the Capitol Hill Spectator, which comes out every week.”⁶⁰ Witness Seitz, of Dorothy Stead, Inc. (Washington, D.C.), testified that she engages in “general advertising . . . in the very local Georgetowner [newspaper] which comes out every two weeks” and in “the Star and in the Post for our sale merchandise only. That’s the only time that we advertise in the other papers, if it is a sale that we are having.”⁶¹ Asked if she used such promotional media “as direct mailers or bill stuffers or anything of that nature,” the witness answered: “General going-back-to-school advertising . . . Again, it would be general; maybe a sweater and a skirt, not specifying anything particular, or a coat, a rain-coat or something of that sort. But usually it was just the general type of mailer that we sent out . . . Yes, which we do at Christmas time as well, which is announcing to the public that we have Christmas gifts available. But it’s usually general, like, maybe a mink boa or a hat, a pocketbook and that sort of thing . . . We sent it out, as I recall, in the bills that go out for

⁵⁸ Tr. 374-375, 377-378, 394-395 (emphasis added). The hearing examiner concluded that “the evidence indicates that it is highly unlikely that this customer would have undertaken the preparation, and paid half the cost, of window display or mail enclosure material for advertising Viyella if allowances for these purposes had been offered by respondent.” Initial decision, p. 70. We find nothing in the witness’ testimony to support that conclusion.

⁵⁹ Tr. 415.

⁶⁰ Tr. 530.

⁶¹ Tr. 132-133.

Findings of Fact

the first of September, the latter part of August." ⁶² Witnesses Moffett and Noyes, of Lelia Noyes Shop (Washington, D.C.), testified that they advertised in "a little booklet that is put out called 'Shopping in Washington,' and then we advertise in the 'Green Book,' Mrs. Hagner's 'Green Book,' and on occasions we would advertise in catalogs of the nature of—well, the 'International Ball,' let's say, or the 'Antique Shop' or something like that. They were more charitable things. We did no—virtually no advertising in *newspapers*." ⁶³ The witness thought this was not "commercial" advertising:

Q. By not commercial, you mean you didn't pay for it?

A. We paid for it, but I am speaking of commercial now in a *newspaper*. That is a commercial type of advertising. . . .⁶⁴

Noyes testified that, on those occasions when she is running a "sale," "I will put a little ad in the paper" and "I will put a little sign in the window saying 'Suit Sale.'" ⁶⁵ She also engages in "direct mail" advertising.⁶⁶

42. Respondent's advertising allowances to its customers were limited not only to the individually negotiated dollar amounts fixed by its president, Handelsman,⁶⁷ but to two media, magazines and newspapers. Respondent stipulated in this proceeding that only newspapers and magazines were *in fact* used in 1961 and 1962, the years in question here, but argues that this was the choice of its retail customers, not House of Lord's. The record is clear, however, that it was newspaper advertising Lord's wanted, not the miscellaneous promotions (displays, "stuffers," and so on) within the reach of their smaller customers, and that the custom-

⁶² Tr. 184.

⁶³ Tr. 304 (emphasis added).

⁶⁴ Tr. 305 (emphasis added).

⁶⁵ Tr. 333, 335.

⁶⁶ Tr. 332.

⁶⁷ As noted above (n. 56, *supra*), several of the favored customers testified that Handelsman gave them less money than they wanted. For example, one witness testified as follows:
Q. In 1962, then, would you have accepted more money if it was offered to you for advertising Viyella dresses?

A. Yes, we would.

Hearing Examiner Tinley: What do you mean by that, you would have run a larger ad? Is that what it adds up to?

The Witness: Yes. We would have run a larger ad or two ads.

[Tr. 440. See also tr. 455.]

After the maximum amount respondent was willing to furnish each customer had been individually negotiated with that customer, either at the time of the purchase or later, by telephone, Handelsman carefully put the agreement in writing: "This will confirm agreement, according to which we will contribute \$75.00 towards a cooperative *newspaper* ad on our Viyella dresses. This ad is to be on a fifty-fifty basis, *our share not to exceed the specified sum.*" CX 11 (emphasis added). See also CX 17, 21-25, 30.

Findings of Fact

69 F.T.C.

ers so understood the Lord's "program." Handelsman, explaining how his saleslady, Mrs. Cole, carries out his alleged instructions to "offer" advertising money to a customer, testified that "she will then tell her that we have this advertising program, should she want to run a cooperative *newspaper* advertising."⁶⁸ And, "[a]t all times, we expect the customer to give us an honest account and charge us 50 per cent of their *newspaper space*, and *that* is what we refund them."⁶⁹

Witness Virginia Simmons, co-owner of Virginia Simmons, Inc., of Washington, D.C., was cross-examined by respondent's counsel as follows:

Q. Going back to 1961 and 1962—and this is what we are limiting ourselves to, Mrs. Simmons—in those years, would you have advertised the name Viyella or House of Lord's in a *newspaper* ad if this were asked of you as a condition to accepting the ad?

A. No, I wouldn't have.⁷⁰

Respondent's saleslady in the Washington, D.C., area, Mrs. Dorothy Cole, explained her technique of offering allowances to customers in these words: "I'm waiting on a customer, for you. You have a shop. I am through waiting on you. I tell you, 'Now, we have an advertising campaign. You can have fifty percent of whatever it costs you to advertise. It is to your advantage because you are getting your name in the *paper* and you are bringing in customers.'"⁷¹

Q. Supposing that in your dealings with me I stated to you that I do no *newspaper* advertising?

A. Then I go up and I say that, if you are not interested, you don't advertise.⁷²

The favored customers, moreover, were compensated only for their "space cost," not for the full cost of producing the advertisements (*e.g.*, art work) they paid for. For example, witness Dorothy Eisenstark, buyer for Best & Co., testified as follows on cross-examination by respondent's counsel:

Q. Were you told that there would be a contribution of fifty percent of

⁶⁸ Tr. 106 (emphasis added). He denies that it is "limited to any type of ad," but adds that "most of the stores do newspaper—very seldom or occasional they will come up with what we call a statement enclosure or end-of-the-month enclosure in which they would sketch a particular garment and enclose it in their statements." Tr. 108-109. And, in 1961 and 1962, "none of the stores have done anything like that. It was strictly newspaper advertising or the New Yorker Magazine. . . . As I say, *so far it has always been newspaper* because they find that's the best medium of results." Tr. 109 (emphasis added).

⁶⁹ Tr. 503 (emphasis added).

⁷⁰ Tr. 538-539 (emphasis added).

⁷¹ Tr. 565-566 (emphasis added).

⁷² Tr. 566 (emphasis added).

44

Findings of Fact

space cost only that would be given or remitted to Best & Company if you engaged in such an advertising program?

A. Yes.⁷³

The buyer for Julius Garfinckel, witness Walser, testified as follows:

Q. In connection with these advertisements . . . [CX 4, 6,] were there any production costs involved in the preparation of these ads?

A. Yes.

Q. When the respondent, when House of Lord's shared the advertising cost, did this include the cost of production?

A. No.

Q. What do production costs include?

A. Art work, layout. I am sure other things that I'm not familiar with. But I would say those were the two main.

Q. Then, was it Julius Garfinckel and Company that had to bear the cost of the production?

A. Yes.

Q. *What cost was it that the House of Lord's was sharing?*

A. Newspaper lineage.

Q. In other words, space cost?

A. Yes, the same thing.⁷⁴

The owner of Lota Kelly Sportswear, Inc., of Cleveland, witness Edgar Bruml, testified that he *asked* respondent Lord's to pay 50% of his *total* costs—including both “production” and newspaper “lineage” costs—but that Handelsman would only pay for half of the latter:

Q. Mr. Bruml, did the money you received from House of Lords cover your *lineage* cost in the newspaper rather than production cost?

A. We *asked* for a sum of money that we feel will cover 50 per cent of our *total* costs and—

Hearing Examiner Tinley: Including the production costs?

The Witness: That is what we would be aiming for.

Q. Can you tell us what the cost of these ads [CX 8, 9] are, what the cost was in 1961 to run two ads like this?

A. I can approximate it. I would say that the space cost of each ad would be about between 70 and 75 dollars, and the art work and the layout for each ad would be in the neighborhood of \$25. So we are talking about approximately \$95 per ad.

Hearing Examiner Tinley: Let me clear up this one point in this connection. Was it your understanding with House of Lords that they would pay 50

⁷³ Tr. 178 (emphasis added).

⁷⁴ Tr. 221-222 (emphasis added).

Conclusions

69 F.T.C.

per cent of your newspaper cost of the advertising or of your total cost including your art work? What was your understanding with them?

The Witness: Well, the understanding is 50 per cent of the newspaper [lineage] cost.

Q. Now, I show you Commission's Exhibit 12 which is a memoranda or debit memo to Lords regarding 1962 cost of advertising. Isn't it so that the cost that is reflected therein is *only the space cost and nothing else*?

A. Yes, I think that is correct.

Q. And isn't it true, Mr. Brumel, that in your dealings with Mr. Handelman, the agreement between the two of you was that Lords would make a rebate of 50 per cent of your *space cost* in advertising Viyella?

A. That is correct, yes.¹⁶

CONCLUSIONS

1. Respondent House of Lord's is engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, 15 U.S.C. 12.

2. In 1961 and 1962, in the course of such commerce, respondent House of Lord's offered to pay, and paid, sums of money ranging in amounts from \$75 to \$2,000 to certain of its customers as compensation or reimbursement for 50% of the lineage or space costs incurred by those customers in publishing newspaper or magazine advertisements of respondent's Viyella dresses.

3. Certain of respondent's other customers, although competing with those favored customers in the distribution of respondent's products, were not informed of, and did not know about, respondent's alleged willingness to make such promotional allowances available to them on similar or any other terms.

4. The promotional allowances offered and granted by respondent House of Lord's in the years 1961 and 1962 were offered and granted solely as compensation for, and on the condition that they be used for, newspaper or magazine advertising. Certain of respondent's other customers find it economically impractical to advertise in these two media. Hence those allowances, even if respondent's alleged willingness to pay them on such limited terms had in fact been communicated to all, would not have been available to those nonfavored customers on proportionally equal terms.

5. The promotional allowances offered and granted by respondent House of Lord's in the years 1961 and 1962 were not, as al-

¹⁶ Tr. 440, 452-453, 460 (emphasis added). CX 12, a debit memorandum to respondent Lord's from Lota Kelly dated September 29, 1962, billed respondent for \$74.39, or 50% of \$148.68, the sum that customer paid to the Cleveland *Plain Dealer* ("252 lines at .59 per line").

leged, part of a general plan whereby respondent offered to pay a fixed percentage of the amount its respective customers desired to spend on the promotion of Viyella dresses, but arbitrarily fixed dollar amounts (*e.g.*, \$100, \$2,000, etc.), determined by respondent in separate negotiations with each favored customer.

6. Respondent House of Lord's has paid promotional allowances to certain of its customers while failing to make such allowances available on proportionally equal terms to all other customers competing in the distribution of such products in violation of Section 2(d) of the amended Clayton Act.

ORDER

This matter having been heard by the Commission on the exceptions of counsel supporting the complaint to the hearing examiner's initial decision dismissing the complaint; and

The Commission having determined that the examiner's findings of facts should be set aside in part and adopted in part, and that the examiner's conclusions and order should be set aside in their entirety:

It is ordered, That the examiner's findings as to the facts numbered 1 through 30, at pages 47 through 55 of the initial decision of February 11, 1965, be, and they hereby are, adopted as the findings of the Commission; that the examiner's findings numbered 31 through 96, at pages 55 through 71 of the initial decision be, and they hereby are, set aside and the accompanying findings of the Commission numbered 31 through 42 be, and they hereby are, issued in lieu thereof; and that the conclusions and order of the examiner be, and they hereby are, set aside and that the accompanying conclusions and order of the Commission be, and they hereby are, issued in lieu thereof.

It is further ordered, That respondent House of Lord's, Inc., a corporation, its officers, directors, agents, representatives and employees, directly or through any corporate or other device, in the course of its business in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Paying or contracting to pay to or for the benefit of any customer anything of value as compensation or in consideration for any advertising or promotional services or facilities furnished by or through such customer in connection with the handling, sale or offering for sale of wearing apparel manufactured, sold or offered for sale by respondent, unless all other customers competing with such favored customer in

Complaint

69 F.T.C.

the distribution or resale of such products are informed, in writing, of (1) the terms and conditions of the promotional program or plan under which such payments are made, including the services or facilities to be furnished therefor; (2) the availability of such payments on proportionally equal terms to all such customers; and (3) if it would not be economically feasible for all such competing customers to furnish such services or facilities, alternative services or facilities such customers can furnish and be paid for on proportionally equal terms.

It is further ordered, That respondent House of Lord's, Inc., shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

Commissioners Reilly and Jones concurred and have filed a separate concurring statement. Commissioner Elman dissented and has filed a dissenting opinion.

IN THE MATTER OF

B & M SPORTSWEAR, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION AND THE WOOL PRODUCTS LABELING
ACTS

Docket C-1033. Complaint, Jan. 18, 1966—Decision, Jan. 18, 1966

Consent order requiring a Massachusetts manufacturer of men's wool athletic jackets to cease misbranding its jackets and interlinings by failing to disclose on labels their true fiber composition.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that B & M Sportswear, Inc., a corporation, and Norman Berries and Morris Berries, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules